82-492

SEP 30 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

JERRY BUCKLEY HELM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MARK V. MEIERHENRY
ATTORNEY GENERAL
State Capitol
Pierre, South Dakota
57501-5090
Telephone (605) 773-3215

Counsel for Petitioner

QUESTION PRESENTED

Whether a statutorily-authorized sentence of life imprisonment, without parole but with a right of commutation, for a nonviolent offender's seventh felony constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	vi
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	7
I. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.	7
II. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.	18
III. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE SOUTH DAKOTA SUPREME COURT.	18

IV. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS ON THE SAME MATTER. 19

CONCLUSION 20

APPENDIX

TABLE OF AUTHORITIES

CASES	PAGE
Britton v. Rogers, 631 F.2d 572, 578 (8th Cir. 1980)	19
Coker v. Georgia, 433 U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977)	13
Gardner v. Florida, 430 U.S. 349, 51 L.Ed.2d 393, 401, 97 S.Ct. 1197 (1977)	11
Gov't of Virgin Islands v. Gereau, 592 F.2d 192 (3rd Cir. 1979)	19
Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 938 (1974)	13
Hutto v. Davis, 30 Cr.L. 4159, n. 2, 4161, 4162	PASSIM
Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 989, 98 S.Ct. 2954 (1978)	11
Moore v. Corvan, 560 F.2d 1298, 1303 (6th Cir. 1977), cert. denied, 435 U.S 929 (1978)	19
Rummel v. Estelle, 445 U.S. 263, 63 L.Ed.2d 382, 389, 390, 391, n. 11, 395-396, 100 S.Ct. 1133 (1980)	PASSIM
State v. Helm, 287 N.W.2d 497, 498 (S.D. 1980)	4, 5, 18
Terrebonne v. Blackburn, 646 F.2d 997 (5th Cir. 1981)	19
United States v. Valenzuela, 646 F.2d 352 (9th Cir. 1980)	19

STATUTES

SDCL 22-7-8	3
SDCL 24-14-1	3
SDCL 24-14-5	3
SDCL 24-15-4	3, 5, 9, 16

OTHER REFERENCES

28 U.S.C. § 1254	2
28 U.S.C. § 2241(d)	5
28 U.S.C. § 2253	6

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears in the appendix (Appendix A, pp. A-1 to A-21).

The opinion of the South Dakota Supreme Court appears in the appendix (Appendix A, pp. A-22 to A-40).

NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

JERRY BUCKLEY HELM,

Respondent.

JURISDICTIONAL STATEMENT

On August 4, 1982, the Eighth Circuit Court of Appeals in St. Louis entered Judgment and filed an Opinion granting to Respondent his Petition for Writ of Habeas Corpus unless Respondent was resentenced within sixty days. A

Motion for Technical Correction of the Court's Opinion was requested and denied on September 3, 1982. Appendix A, pp. A-41, A-47, and A-49. A Motion for Stay pending this Petition for Writ of Certiorari was granted on August 26, 1982. Appendix A, p. A-48.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 and Rules of the Supreme Court No. 20 (1980).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the Constitution of the United States provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein

> they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant portions of the South Dakota Codified Laws, SDCL 24-15-4, SDCL 22-7-8, SDCL 24-14-1, and SDCL 24-14-5, are as follows:

> SDCL 24-15-4. A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles.
>
> SDCL 22-7-8. When a defendant has been convicted of at least three prior convictions in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony.
>
> SDCL 24-14-1. The Governor may, by executive order, delegate to the board of pardons and paroles the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to him.
>
> SDCL 24-14-5. The Governor may submit an application for clemency to the board of pardons and paroles for its recommendation. The Governor may, by executive order, delegate to

> the board the authority to consider applications for clemency and make recommendations to him. The Governor is not bound to follow a recommendation returned by the board.

STATEMENT OF THE CASE

Jerry Buckley Helm pled guilty to a felony charge of uttering a no account check for one hundred ($100.00) dollars. Helm also admitted to convictions for six (6) previous felonies for which "he had spent most of his adult lifetime behind bars." State v. Helm, 287 N.W.2d 497, 498 (S.D. 1980). Helm was adjudged to be an habitual offender.

Following entry of his guilty plea, Helm waived his right to a presentence investigation and requested immediate sentencing. Helm was sentenced to life imprisonment in the state penitentiary.

The statute in effect at the time of Helm's sentencing provided that "[a] person sentenced to life imprisonment is not eligible for the parole by

the board of pardons and paroles." SDCL 24-15-4. Thus, by imposing a life sentence, the sentencing judge committed Helm to the state penitentiary for the remainder of his natural life, barring a pardon or commutation of his sentence.

Helm appealed from his sentence, contending that the imposition of a sentence of life imprisonment without parole constituted cruel and unusual punishment. The Supreme Court of South Dakota affirmed the judgment of the trial court. State v. Helm, supra.

Helm then petitioned for a writ of habeas corpus in federal district court alleging that his sentence constituted cruel and unusual punishment. The United States District Court for the District of South Dakota, Western Division, exercising its jurisdiction pursuant to 28 U.S.C. § 2241(d), held that Helm had effectively waived any right to a presentence investigation, and that Rummel v. Estelle, 445 U.S. 263 (1980), disposed

of Helm's claim that the sentence imposed constituted cruel and unusual punishment.

Helm then appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit, pursuant to 28 U.S.C. § 2253. At oral argument before the Eighth Circuit panel, the State of South Dakota was requested to provide the Court with statistical evidence concerning the results of commutation requests from prisoners serving life sentences in the South Dakota state penitentiary. Those statistics were provided the Court and indicated that twenty-two (22) prisoners in the South Dakota penitentiary had their life sentences commuted between 1964 and 1975. During the same time period, commutation requests from 12 prisoners were denied. Moreover, since 1975, the Governors of the State of South Dakota have commuted no life sentences but have denied requests for commutation of life sentences from twenty-five (25) prisoners (the above twelve

(12) plus thirteen (13) more), including Helm. In sum, during the total time period for which statistics were made available, twenty-two (22) life sentences were commuted while twenty-five (25) life sentences were not. Appendix A, pp. A-41-A-47, and A-49.

Following oral argument, the Eighth Circuit panel reversed and remanded Helm's sentence "with directions to issue the writ if, within sixty (60) days following the issuance of our mandate, the State has not resentenced Helm."

The State then petitioned this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In Rummel v. Estelle, 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980), a Texas felon who had been previously convicted of

"fraudulent use of a credit card to obtain $80 worth of goods or services" and passing a forged check in the amount of $28.36" was convicted of obtaining $120.74 by false pretenses. Upon conviction, Rummel, because of his two prior felony convictions and the prosecutor's decision to charge him as a recidivist, was given the life sentence mandated by Texas law.

Rummel subsequently challenged his life sentence as cruel and unusual punishment prohibited by the United States Constitution.

After argument, this Court ruled that Rummel's sentence was not prohibited cruel and unusual punishment within the meaning of the United States Constitution. In its analysis, the Court noted that it had on occasion found sentences "grossly disproportionate to the severity of the crime." Rummel, at p. 389. However, the Court further noted that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been

exceedingly rare." At p. 390. After an exhaustive review of the case law, the Court then concluded as follows:

> Given the unique nature of the punishments considered in Weems and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence imposed is purely a matter of legislative prerogative.

At p. 391.

However, the Eighth Circuit panel, in its Helm opinion (see Appendix, at A-12 to A-13), ruled that Rummel is inapplicable to Helm's case because under the Texas statute, Rummel was eligible for parole whereas Helm is not eligible for parole as a matter of South Dakota law. SDCL § 24-15-4. The Eighth Circuit opinion rests on the assumption that for Eighth Amendment purposes, there are three categories of sentences--life with parole, life without parole, and death. Appendix, at A-13.

This novel theory is, of course, necessary to the Eighth Circuit's claim that Rummel is not dispositive of Helm's appeal. However, this novel theory does not comport with this Court's analysis in Rummel. As stated by the Court:

> Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel. (Emphasis added.)

At p. 390.

Moreover, this Court in its per curiam opinion in Hutto v. Davis, 30 Cr.L. 4159, analyzed Rummel and concluded:

> In rejecting that argument, we distinguished between punishments--such as the death penalty-- which by their very nature differ from all other forms of conventionally accepted punishment, and punishments which differ from others only in duration. (Emphasis added.)

It is, therefore, the State's position that the Eighth Circuit's opinion is not consistent with Rummel, as Rummel is understood by its authors,

the United States Supreme Court. Nor is it consistent with this Court's death penalty cases wherein it is stated that the rejection of some death statutes as cruel and unusual punishment "rested on the predicate that the penalty of death is qualitatively different from any other sentence." Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 989, 98 S.Ct. 2954 (1978). See also Gardner v. Florida, 430 U.S. 349, 51 L.Ed.2d 393, 401, 97 S.Ct. 1197 (1977).

Although conceding that "Rummel stands for the proposition that federal courts should be reluctant to review legislatively mandated terms of imprisonment . . . and that successful challenges to the proportionality of particular sentences should be exceedingly rare" (Hutto v. Davis, supra at p. 4159), the Eighth Circuit panel nevertheless argues that the opinion in Rummel admits that the "proportionality principle would come into play in an imprisonment sentence in extreme cases," citing p. 391, n. 11 which states

the example of a legislature making "overtime parking a felony punishable by life imprisonment." The Eighth Circuit's point is also made by the dissenters in Hutto v. Davis, supra at p. 4161. However, as those same dissenters admit, "the per curiam suggests that because the punishment imposed on respondent was within the maximum prescribed by the state legislature, the Court of Appeals, which affirmed the District Court's grant of habeas relief on Eighth Amendment grounds, sanctioned an intrusion into the basic line-drawing province of legislatures, not courts." The dissenters conclude that "by suggesting that it was improper for the courts below to engage in a disproportionality analysis, [the per curiam decision] represents a serious and improper expansion of Rummel." At p. 4161. The State accepts the dissenters conclusion that the majority decision in Hutto v. Davis stands for the proposition that proportionality analysis is inapplicable to non-capital punishment cases.

Further evidence for this proposition is provided by this Court's position in Hutto v. Davis, supra at p. 4159 that Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 938 (1974), "was implicitly disapproved" in Rummel.

The Eighth Circuit persists, however, by arguing that the proportionality test expressed by the Court in Coker v. Georgia, 433 U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977) is applicable to Helm's case.

In response, the State notes that Coker is a death penalty case and, therefore, irrelevant to Helm's sentence.

Even assuming relevance, the Eighth Circuit's Coker review of "the sentence imposed for commission of the same crime in other jurisdictions" is inapplicable because according to Rummel and Hutto v. Davis, supra at p. 4159, n. 2, this Court has rejected such comparisons, stating that "absent a constitutionally imposed

uniformity, inimical to traditional notions of federalism, some states will always bear the distinction of treating particular offenders more severely than in any other state."

With respect to the Coker test of "the sentence imposed upon other criminals in the same jurisdiction," this Court has held "[t]his comparison was rejected in Rummel because other crimes implicate other societal interests, making any such comparison inherently speculative." Hutto v. Davis, supra at p. 4159, n. 2.

With respect to the Coker test of "the nature of the offense," the State contends that Helm's total of seven felonies and incarceration for most of his adult life necessitates the conclusion that his is not "life imprisonment for overtime parking."

The State, therefore, concludes that not only is it impermissible to review the proportionality of Helm's sentence but also that Helm's sentence is proportional.

To the Eighth Circuit's further assertion that Rummel's eligibility for parole was the crucial factor upholding his sentence, the State responds that the fact of parole was merely an illustration of the complexities involved in Rummel's proposed interjurisdictional analysis. Rummel, at p. 395. Another factor of equal importance to the Court was "the role of prosecutorial discretion in any recidivist scheme." Rummel, at p. 395. And after review of those factors, the Rummel Court, at pp. 395-396, held as follows:

> Even if we were to assume that the statute employed against Rummel was the most stringent found in the 50 states, that severity hardly would render Rummel's punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other states. As Mr. Justice Holmes noted in his dissenting opinion in Lochner v. New York, 198 U.S. 45, 49 L.Ed. 937, 25 S.Ct. 539 (1905), our Constitution 'is made for people of fundamentally differing views . . . .'

Moreover, it is the State's belief that Rummel, if it does not stand for the proposition

that sentencing is a legislative prerogative, stands for the proposition that states may punish those who are simply unable to bring their conduct within the social norms prescribed by the criminal law of the states.

> Rummel rests on the understanding that as a consequence of the overwhelming state interests in deterring habitual offenders, the Eighth Amendment does not preclude a state from imposing what might otherwise constitute a disproportionate prison sentence on an individual determined under state law to be a habitual offender. (Emphasis added.)

Hutto v. Davis, supra at p. 4162. Unlike the Petitioner in Hutto v. Davis, both Rummel and Helm were sentenced as habitual offenders.

Next, the State challenges the Eighth Circuit's depiction of SDCL § 25-15-4--disallowing parole for offenders sentenced to life imprisonment--as fundamentally different from the Texas statute in Rummel. In fact, South Dakota law also contains the following statutes:

> SDCL 24-14-1 provides: 'The Governor may, by executive order, delegate to

> the board of pardons and paroles the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to him.'
>
> SDCL 24-14-5 provides: 'The Governor may submit an application for clemency to the board of pardons and paroles for its recommendation. The Governor may, by executive order, delegate to the board the authority to consider applications for clemency and make recommendations to him. The Governor is not bound to follow a recommendation returned by the board.'

Therefore, the possibility of commutation of Petitioner's life sentence narrows any alleged discrepancies between the South Dakota law and the Texas statute interpreted in Rummel. The facts presented in this Petition's Statement of Facts testify to the availability of commutation in South Dakota.

Finally, as further evidence that the Eighth Circuit's decision is in conflict with the prior opinions of this Court, the State would note the sarcastic comment of the author of the Eighth Circuit's opinion, when confronted with Hutto v. Davis, supra, at oral argument, that "I suppose

it will be anarchy if we don't uphold Helm's sentence."

II. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Assuming, arguendo, that Rummel v. Estelle and Hutto v. Davis are not dispositive of Helm's appeal, the State of South Dakota believes that the question whether a statutorily-authorized sentence of life imprisonment, without parole but with a right of commutation, for a nonviolent offender's seventh felony constitutes cruel and unusual punishment is an important question of federal law which has not been, but should be, settled by this Court.

III. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE SOUTH DAKOTA SUPREME COURT.

Since the South Dakota Supreme Court upheld (State v. Helm, supra) Helm's sentence,

the decision of the Eighth Circuit Court of Appeals is in conflict with a decision of a state court of last resort.

IV. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS ON THE SAME MATTER.

Notwithstanding the Eighth Circuit panel's attempt to distinguish Helm's facts, the State contends that the instant case conflicts with the following decisions:

1. Britton v. Rogers, 631 F.2d 572, 578 (8th Cir. 1980),

2. Terrebonne v. Blackburn, 646 F.2d 997 (5th Cir. 1981),

3. United States v. Valenzuela, 646 F.2d 352 (9th Cir. 1980),

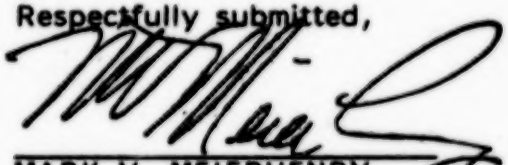
4. Gov't of Virgin Islands v. Gereau, 592 F.2d 192 (3rd Cir. 1979), and

5. Moore v. Corvan, 560 F.2d 1298, 1303 (6th Cir. 1977), cert. denied, 435 U.S 929 (1978).

CONCLUSION

Based on the foregoing arguments and authorities, the State of South Dakota prays that its Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,



MARK V. MEIERHENRY
ATTORNEY GENERAL
State Capitol
Pierre, South Dakota 57501-5090
Telephone: (605) 773-3215
Counsel for Petitioner

Office - Supreme Court, U.S.
FILED
OCT 1 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-492

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

JERRY BUCKLEY HELM,

Respondent.

SUPPLEMENTAL APPENDIX

MARK V. MEIERHENRY
ATTORNEY GENERAL
State Capitol
Pierre, South Dakota
57501-5090
Telephone (605) 773-3215

Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1039

Jerry Helm,	*	
	*	
Appellant,	*	
	*	
v.	*	Appeal from the United
	*	States District Court
Herman Solem, etc.,	*	for the District of
	*	South Dakota
Appellee.	*	

Submitted: April 23, 1982

Filed: August 4, 1982

Before LAY, Chief Judge; BRIGHT and ROSS, Circuit Judges.

BRIGHT, Circuit Judge.

Jerry Buckley Helm appeals from the denial of his petition for a writ of habeas corpus. He asserts that the sentence he received as an

habitual offender, life imprisonment without parole, constitutes cruel and unusual punishment. We agree, and, accordingly, reverse and remand for further proceedings consistent with this opinion.

I. Background.

Helm entered a guilty plea to a felony charge of uttering a "no account" check for $100. Against the advice of counsel, Helm also admitted to six prior felony convictions[1] and, as a result, was sentenced as an habitual offender.[2]

---

[1] The six prior felonies included three convictions for third degree burglary, and one conviction each for a third offense for driving while intoxicated, grand larceny, and obtaining money under false pretenses.

[2] At the time of Helm's conviction, South Dakota's habitual offender statute read:

> Three or more prior felony convictions--Sentencing as for Class 1 felony. When a defendant has been convicted of at least three prior convictions in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony. [S.D. Codified Laws Ann. § 22-7-8 (1979).]

The record indicates that Helm, age thirty-six at the time of his conviction, is an alcoholic and has spent much of the last fifteen years in the South Dakota State Penitentiary. State v. Helm, 287 N.W.2d 497, 499 (S.D. 1980). Alcohol contributed to Helm's actions leading to this conviction and each of his prior convictions. In describing the facts prior to his guilty plea to the bad check charge, Helm stated:

> "I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places." [State v. Helm, supra, 287 N.W.2d at 501.]

Following entry of his guilty plea, Helm waived his right to a presentence investigation and requested immediate sentencing. The state trial judge acceded to his request and made the following statement in pronouncing Helm's life sentence from the bench:

"Well, I guess most anybody looking at this record would have to acknowledge you have a serious problem, if you've been drinking all this time and your prior imprisonments have not had any effect on your drinking problem, so far as motivating you for change. If you get out in the near future, you're going to be committing further crimes, so I can't see any purpose in my extending any leniency to you at all here and I intend to give you a life sentence.

It will be up to you and the parole board to work out when you finally get out,[3] but I think you certainly earned

---

[3] It is unclear whether the sentencing judge believed that Helm would become eligible for parole under his life sentence, or whether the sentencing judge's reference to the parole board reflected his recognition that South Dakota statutes allow the Governor to delegate to the board of pardons and paroles certain functions regarding executive clemency. Those statutes provide:

> The Governor may, by executive order, delegate to the board of pardons and

> this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over." [State v. Helm, supra, 287 N.W.2d at 500.]

The statute in effect at the time of Helm's sentencing provided that "[a] person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S.D. Codified

---

> paroles the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to him. [S.D. Codified Laws Ann. § 24-14-1 (1979).]
>
> The Governor may submit an application for clemency to the board of pardons and paroles for its recommendation. The Governor may, by executive order, delegate to the board the authority to consider applications for clemency and make recommendations to him. The Governor is not bound to follow a recommendation returned by the board. [Id. § 24-14-5.]

Laws Ann. § 24-15-4 (1979). Thus, by imposing a life sentence, the sentencing judge committed Helm to the state penitentiary for the remainder of his natural life, barring a pardon or commutation of his sentence.

Helm appealed from his sentence, contending that the imposition of a sentence of life imprisonment without parole denied him due process and constituted cruel and unusual punishment. The Supreme Court of South Dakota, with two justices dissenting, affirmed the judgment of the trial court. State v. Helm, supra.

Helm then petitioned for a writ of habeas corpus in federal district court alleging that his sentence constituted cruel and unusual punishment, and that the sentencing procedure violated his right to due process because the judge imposed the maximum sentence allowed by law without a presentence investigation. The State filed an answer to Helm's petition, and the district court denied the petition without a hearing.

In a memorandum opinion, the district court determined that Helm had effectively waived any right to a presentence investigation, and that Rummel v. Estelle, 445 U.S. 263 (1980), disposed of Helm's claim that the sentence imposed constituted cruel and unusual punishment. Helm filed this appeal.

II. Discussion.

On appeal, Helm presses only his claim that a life sentence without parole under the circumstances of this case violates his constitutional right to be free from cruel and unusual punishment.[4] Helm contends that Rummel v. Estelle

---

[4] Helm exhausted his state remedies on both claims asserted in his federal habeas petition. The South Dakota Supreme Court considered and rejected his contentions that the state trial judge denied him due process by imposing a life sentence on the basis of inadequate information, and that such a sentence constituted cruel and unusual punishment. State v. Helm, supra, 287 N.W.2d at 498. Helm presented both claims in his habeas petition in federal district court. In its memorandum opinion, the district court stated that it was "satisfied that the Petitioner has exhausted his state remedies." Helm v. Solem,

does not control this case, because the life sentence imposed on Rummel carried with it the possibility of parole. We agree that Rummel is not dispositive.

In Rummel, the Supreme Court upheld the imposition of a mandatory life sentence under Texas' recidivist statute upon Rummel's felony conviction for obtaining $120.75 by false pretenses. At the time, Rummel had two prior felony convictions--passing a forged check in the amount of $28.36, and fraudulently using a credit card to obtain $80 worth of goods or services. 445 U.S. at 265-66. Rummel challenged his life sentence on the ground that it violated the proscription of the eighth and fourteenth amendment against cruel and unusual punishment because it

---

No. CIV 81-5148, slip op. at 1 (D.S.D. Dec. 12, 1981). Although Helm does not pursue his due process claim on appeal, he has complied with the total exhaustion rule recently announced by the Supreme Court in Rose v. Lundy, ___ U.S. ___, 102 S.Ct. 1198 (1982).

was so grossly disproportionate to the severity of his crime. The Court rejected the disproportionality analysis urged by Rummel, concluding that the task of drawing lines between one term of years and a shorter or longer term of years properly belonged to the legislature, not the courts. Id. at 275-76. The Court stated that

> one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative. [Id. at 274 (footnote omitted).]

The Court in Rummel, however, did not totally reject the idea that a term of imprisonment might be so disproportionate to the offense as to be unconstitutional. The plurality noted: "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, * * * if a legislature made overtime parking a felony punishable by life

imprisonment." Id. at 274 n.11. More importantly for the analysis in this case, the Court distinguished the life sentence at issue in Rummel from a life sentence without parole.

> Texas, we are told, has a relatively liberal policy of granting "good time" credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years. * * * We agree with Rummel that his inability to enforce any "right" to parole precludes us from treating his life sentence as if it were equivalent to a sentence of 12 years. Nevertheless, because parole is "an established variation on imprisonment of convicted criminals," Morrissey v. Brewer, 408 U.S. 471, 477 (1972), a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life. If nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person sentenced under a recidivist statute like Mississippi's, which provides for a sentence of life without parole upon conviction of three felonies including at least one violent felony. See Miss. Code Ann. § 99-19-83 (Supp. 1979). [Id. at 280-81.]

The State in this case contends, however, that no meaningful distinction exists between a

life sentence with parole and one without parole. It relies on Hutto v. Davis, ___ U.S. ___, 102 S.Ct. 703 (1982) (per curiam), to support its contention that a disproportionality analysis does not apply in noncapital cases. There, the Court upheld the imposition of two consecutive twenty-year sentences upon Davis' convictions for possession and distribution of less than nine ounces of marijuana. In rejecting Davis' cruel and unusual punishment claim, the Court stated that

> Rummel stands for the proposition that federal courts should be "reluctan[t] to review legislatively mandated terms of imprisonment," id. at 274, 100 S.Ct., at 1139, and that "successful challenges to the proportionality of particular sentences" should be "exceedingly rare," id. at 272, 100 S.Ct., at 1138. [102 S.Ct. at 705 (footnote omitted).]

We recognize that Rummel and Davis caution federal judges against imposing their subjective views of sentencing upon the states when reviewing claims that state sentences constitute cruel and unusual punishment because of their length.

Neither case, however, addressed the precise issue before us. Davis received consecutive sentences for a definite term of years. More significantly, the sentences imposed upon both Rummel and Davis carried the prospect of parole.[5] By contrast, Helm must serve the rest of his life behind bars.[6]

---

[5] The Supreme Court noted that under Texas' relatively liberal policy of granting good time credits, a prisoner with a life sentence could become eligible for parole in 12 years. Rummel v. Estelle, supra, 445 U.S. at 280.

In Davis's case, it appears that he would become eligible for parole upon serving one-third of his sentence. See W. Va. Code § 62-12-13 (Supp. 1981).

[6] The State contends that the possibility of commutation of Helm's sentence to a term of years with the possibility of parole brings the sentence in this case within the holding of Rummel. We recognize that the frequency with which a state's executive exercises its power of clemency might affect our disposition of this case. See Terrebonne v. Blackburn, 646 F.2d 997, 1000 (5th Cir. 1981) (en banc); Britton v. Rogers, 631 F.2d 572, 578 (8th Cir. 1980), cert. denied, 451 U.S. 939 (1981). In a similar case, the Fifth Circuit took judicial notice of statistics on the frequency of commutations. Terrebonne v. Blackburn, supra, 656 F.2d at 1000 & n.4. At

A life sentence without parole differs qualitatively from a sentence for a term of years or a life sentence with the prospect of parole. As with the death penalty, the State totally rejects

---

oral argument, therefore, we asked counsel for the State to supply us with statistics on commutations of life sentences in South Dakota.

We have reviewed the information supplied and conclude that the possibility of a commutation for Helm is entirely too speculative to equate his life sentence with that in Rummel. The statistics indicate that 22 prisoners in the South Dakota penitentiary had their life sentences commuted between 1964 and 1975. The statistics, however, do not indicate what percentage of requests during this same time period were denied. Moreover, since 1975, the Governor of South Dakota has commuted no life sentences but has denied requests for commutation of life sentences from 25 prisoners, including Helm. This case, therefore, differs from Britton v. Rogers, supra, 631 F.2d at 578, in which we noted that the Governor of Arkansas had commuted 30 life sentences to terms of years between 1974 and 1979.

On this record, we decline to equate the possibility of commutation with the possibility of parole in Rummel. Cf. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 464 (1981) (decision to commute long-term sentence does not depend upon objective factfinding, but upon purely subjective evaluations of those entrusted with that decision).

rehabilitation as a basic goal of our criminal justice system by imposing a life sentence without parole. Because a life sentence without parole differs in kind from other sentences of imprisonment, the constitutional prohibition against cruel and unusual punishment requires that it bear some relationship to the severity of the underlying crime. [7]

In comparing the length of sentence in this case to the offense, we remain mindful of the Supreme Court's admonition that a determination that a particular punishment is excessive should depend upon objective factors to the maximum extent possible. Coker v. Georgia, 433 U.S. 584, 592 (1977). Accordingly, we take into

---

[7] We recognize, of course, that a life sentence without parole also differs qualitatively from the death penalty. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). Therefore, in imposing such a sentence the procedures need not correspond exactly to those required for imposing the death penalty. See Terrebonne v. Blackburn, supra, 646 F.2d at 1008 (Frank Johnson, Jr., J., dissenting).

account the collective judgment of the fifty state legislatures and the nature of the offense[8] in evaluating the appropriateness of Helm's life sentence without parole. We recognize that some state will always bear the distinction of treating particular offenders more severely than any other state. See Rummel v. Estelle, supra, 445 U.S. at 282. When a disproportionality analysis is appropriate, however, the punishment that other states authorize for similar offenses provides an objective backdrop against which to judge the sentence under attack. See Coker v. Georgia, supra, 433 U.S. at 593-96.

Helm could have received a life sentence without parole for his offense in only one other state, Nevada.[9]

---

[8] In examining the nature of the offense, we look at the principal felony, uttering a no account check, in the context of a state's recidivist scheme. In so doing, we consider the nature of the prior felonies and the circumstances surrounding Helm's prior crimes.

[9] Nevada authorizes a sentence of life imprisonment with or without the possibility of parole for

Other states either do not authorize such a drastic sanction for habitual offenders,[10] or require at least one prior felony conviction for a violent crime as a prerequisite to a sentence of life imprisonment without parole.[11] Because Helm had

---

a person convicted of a felony or a crime in which intent to defraud is an element, if the person has three prior convictions. See Nev. Rev. Stat. § 207.010 (1981).

[10] See, e.g., Ariz. Rev. Stat. Ann. § 13-604 (Supp. 1981); Idaho Code §§ 19-2514, 20-223 (1979 & Supp. 1981); Ky. Rev. Stat. § 532.080 (Supp. 1980); Mass. Gen. Laws Ann. ch. 127, § 133B (1974); R.I. Gen. Laws § 12-19-21 (1981); S.C. Code Ann. § 17-25-40 (1977); Utah Code Ann. §§ 77-27-3, 7-11 (Utah Supp. 1981); Vt. Stat. Ann. tit. 13, § 11 (1974), tit. 28 § 501(a) (1981); Wash. Rev. Code Ann. §§ 9.92.090, 9.95.040(3) (1977).

[11] See Ala. Code § 13A-5-9(c) (3) (Supp. 1981) (violent felonies and treason); Ark. Stat. Ann. § 43-2328.1 (1977) (murder, rape, carnal abuse, or kidnapping); Del. Code Ann. tit. 11, § 4214 (1979) (specified violent felonies); Ill. Ann. Stat. tit. 38 § 33B-1, 1003-3-3(d) (Smith-Hurd Supp. 1981) (murder or class X felony); La. Rev. Stat. Ann. § 15:529.1(A) (2) (b) (1981) (burglary of pharmacy, aggravated battery, robbery, aggravated escape); Md. Code Ann. art. 27., § 643B (1982) (crimes of violence); Miss. Code Ann. § 99-19-83 (Supp. 1981) (one violent felony).

Alaska, Tennessee, and Wyoming appear to authorize life sentences without parole for certain

no prior convictions for violent crimes, see supra note 1,[12] he contends that life imprisonment without parole is grossly disproportionate to the severity of his offense. Based on our comparison of the laws of the other states, we agree. By refusing to impose a life sentence without parole upon habitual offenders or by reserving such a sentence for habitual offenders whose felonies

---

nonviolent crimes. For example, Alaska authorizes such a sentence for certain habitual drug offenders. Alaska Stat. § 17.10.200(c) (3) (1975). Tennessee provides for such a sentence for certain violent and infamous crimes as well as certain drug convictions. Tenn. Code Ann. §§ 40-2801, - 2806 (1975). And Wyoming authorizes a life sentence, apparently without parole, for a person convicted of four felonies. Wyo. Stat. §§ 6-1-110, 7-13-402 (1977). Helm's crime, however, would not have constituted a felony under Wyoming's bad check statute. See Wyo. Stat. § 6-3-124 (Supp. 1981).

[12] Helm had three third-degree burglary convictions. The record, however, fails to disclose that those crimes involved any violence. Moreover, third-degree burglary in South Dakota constitutes a crime against property, not persons, inasmuch as it entails entry of an unoccupied structure, S.D. Codified Laws Ann. § 22-32-8 (1979).

include at least one crime of violence,[13] the overwhelming majority of states indicate the inappropriateness of such a sentence in the circumstances of this case.[14]

---

[13] We recognize that the Supreme Court refused to distinguish between crimes of violence and property crimes in Rummel. 445 U.S. at 283 n. 27. The Court declined to make such a distinction, however, because it totally rejected the application of a disproportionality analysis in that case. Because the principle of proportionality applies in this case, we believe that the absence or presence of violence provides an appropriate criterion with which to compare Helm's sentence to sentences authorized by other states.

[14] We note that at least two courts have upheld life sentences without parole for drug convictions not involving actual violence. See Terrebonne v. Blackburn, 646 F.2d 997 (5th Cir. 1981) (en banc); United States v. Valenzuela, 646 F.2d 352 (9th Cir. 1981). In Terrebonne, however, the majority equated the distribution of heroin with crimes of violence. 646 F.2d at 1002. And in Valenzuela, the court upheld the sentence because "the district court exercised its discretion under 21 U.S.C. § 848 in imposing a life sentence, based upon its finding of a long-term, large-scale, highly profitable drug operation." 646 F.2d at 354 n.1 (citation omitted).

To the extent that the crimes in Terrebone and Valenzuela differ from the relatively minor property offenses at issue here, we believe those cases may be distinguished. To the extent that

An examination of the circumstances surrounding each of Helm's prior felony convictions indicates that a life sentence without parole is grossly disproportionate. In each of his crimes alcohol was a contributing factor. Although Helm's alcoholism does not excuse his failure to bring his conduct within the social norms prescribed by the criminal law, it is nonetheless a condition amenable to treatment. See Powell v. Texas, 392 U.S. 515, 562 (1968) (Fortas, J., dissenting). To forsake rehabilitation by imposing a life sentence without parole on an individual whose alcoholism has caused him to run afoul of the law, does not accord with "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). [15]

---

those cases rejected a disproportionality analysis in reviewing a life sentence without parole, however, we decline to follow them.

[15] We recognize that life sentences without parole do not invariably violate the proscription against

Accordingly, we conclude that a life sentence without parole in the circumstances of this case is so grossly disproportionate to the nature of the offense that its imposition constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments.[16]

---

cruel and unusual punishment. See Schick v. Reed, 419 U.S. 256, 267 (1974) (no parole condition attached to commutation of death sentence for murder); Gov't. of Virgin Islands v. Gereau, 592 F.2d 192, 195 (3d Cir. 1979) (conviction and sentence for eight counts of first-degree murder eliminated possibility of parole ; Moore v. Cowan, 560 F.2d 1298, 1303 (6th Cir. 1977), cert. denied, 435 U.S. 929 (1978) (life sentence without parole for rape conviction). In the circumstances of this case, however, considering the nature of Helm's offense and the punishments imposed for similar offenses in other states, the imposition of such a sentence violates the Constitution.

[16] The State points out that the life sentence imposed upon Helm is discretionary, and argues that a discretionary sentence is less harsh than a mandatory one. The discretionary nature of a sentence alone, however, cannot insulate a particular sentence from constitutional attack. The proscription against cruel and unusual punishment applies equally to sentences mandated by legislatures and those imposed by courts. See Furman v. Georgia, supra, 408 U.S. at 241 (Douglas, J., concurring).

We reverse and remand with directions to issue the writ if, within sixty days following the issuance of our mandate, the State has not resentenced Helm.[17]

A true copy.

Attest:

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

---

[17] Although we recognize that Helm waived his right to a presentence investigation in the previous proceeding, we suggest that the state court conduct a presentence investigation before resentencing Helm.

STATE of South Dakota, Plaintiff
and Respondent,

v.

Jerry Buckley HELM, Defendant
and Appellant.

No. 12789.

Supreme Court of South Dakota.

Argued Nov. 7, 1979.

Decided Jan. 16, 1980.

Defendant plead guilty to the crime of uttering a no account check and also admitted to convictions for six previous felonies. The Circuit Court, Seventh Judicial Circuit, Pennington County, Thomas Parker, J., adjudged defendant to be an habitual offender and sentenced him to life imprisonment. On appeal, the Supreme Court, Dunn, J., held that imposition of a life sentence under habitual offender statute for crime of uttering a no account check, after convictions for six previous felonies, was not constitutionally offensive.

Affirmed.

Wollman, C. J., concurred specially and filed opinion.

Morgan, J., dissented and filed opinion.

Henderson, J. dissented and filed opinion.

CRIMINAL LAW 1211

Imposition of a life sentence under habitual offender statute for crime of uttering a no account check, after convictions for six previous felonies, was not constituionally offensive. (Per Dunn, J., with one Justice concurring and one Justice concurring specially.) SDCL 22-7-8; 22-7-1(2) (Repealed).

Margaret Crew, Asst., Atty. Gen., Pierre, for plaintiff and respondent; Mark V. Meierhenry, Atty. Gen., Pierre, on brief.

Joseph Neiles, Pennington County Asst. Public Defender, Rapid City, for defendant and appellant.

DUNN, Justice.

Defendant pled guilty to the crime of uttering a no account check. He also admitted to convictions for six previous felonies and was adjudged an habitual offender. He was sentenced to life imprisonment in the state penitentiary. Defendant appeals from this life sentence, contending that it was an abuse of discretion, that it denied him due process of law, and that it constituted cruel and unusual punishment. We affirm.

Before pleading to the primary charge, the trial court gave defendant a thorough explanation of his rights. He was informed on three occasions that his guilty plea would trigger the habitual offender statute and that he could be sentenced to life imprisonment. The defendant and the attorney representing him indicated that defendant understood his rights and the possible consequences of a guilty plea. After this explanation, defendant waived his right to a

preliminary hearing, insisted on pleading guilty, refused a presentence investigation and demanded immediate sentencing. The sentence of life imprisonment followed.

The constitutionality of South Dakota's habitual offender statute was upheld in State v. O'Connor, 265 N.W.2d 709 (S.D. 1978). This statute permits sentencing of a person convicted of three prior felony offenses within the guidelines of a Class 1 felony. SDCL 22-7-8 and SDCL 22-7-1(2). The maximum punishment for a Class 1 felony is a life sentence.

South Dakota has adopted the rule that a sentence within the statutory limits is not reviewable on appeal, even if it is regarded as excessive. State v. Williams, 84 S.D. 547, 173 N.W.2d 889 (1970); State v. Austin, 84 S.D. 405, 172 N.W.2d 284 (1969). This court has stated, however, that a sentence may be constitutionally offensive if its duration is so excessive as to "shock the conscience." State v. Bad Heart Bull, 257 N.W.2d 715 (S.D. 1977).

While the instant sentence is severe, it does not shock the conscience of the court. This was defendant's seventh felony conviction, and his record indicates that he had spent most of his adult lifetime behind bars. His consistent failure to reform places defendant squarely in the category of an habitual offender, and criminologists almost universally agree that the only remaining alternative is to remove such an offender from society and thus protect innocent victims from further criminal activities.

The defendant was fully informed of the possibility of a life sentence; yet he refused to accede to a presentence investigation that might have revealed mitigating factors with regard to his sentence. His main contention now is that his previous felonies involved nonviolent crimes and were due to a severe drinking problem. Our legislature did not see fit to apply the habitual offender statute solely to violent crimes, nor were

alcoholics excepted from its provisions. The legislature has provided this last resort sentence for habitual criminals who refuse to learn from their mistakes or to rehabilitate themselves. The record of this defendant fits all of these criteria, and the imposition of a life sentence, while severe, is not so unusual as to shock the conscience of the court. Such a sentence has not been found to be cruel or unusual in other jurisdictions. Cox v. Commonwealth, 514 S.W.2d 49 (Ky. 1974); State v. Custer, 240 Or. 350, 401 P.2d 402 (1965); State v. Gibson, 16 Wash. App. 119, 553 P.2d 131 (1976).

The judgment of the trial court is affirmed.

FOSHEIM, J. concurs.

WOLLMAN, C. J., concurs specially.

MORGAN and HENDERSON, JJ., dissent.

WOLLMAN, Chief Justice (concurring specially).

As Justice Henderson points out in his dissent, SDCL 24-15-4 precludes the Board of

Pardons and Paroles from granting defendant a parole. This statutory bar does not foreclose the Board from playing a role in defendant's ultimate term of imprisonment, however, for SDCL 24-14-1[1] and SDCL 24-14-5[2] permit the Governor to grant to the Board a significant voice in the exercise of executive clemency. The existence of this role for the Board gives substance to the trial court's statement referred to in Justice Henderson's dissent and militates against a conclusion that the trial court was laboring under a

---

[1] SDCL 24-14-1 provides: "The Governor may, by executive order, delegate to the board of pardons and paroles the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to him."

[2] SDCL 24-14-5 provides: "The Governor may submit an application for clemency to the board of pardons and paroles for its recommendation. The Governor may, by executive order, delegate to the board the authority to consider applications for clemency and make recommendations to him The Governor is not bound to follow a recommendation returned by the board."

misapprehension of law or fact that would constitute an error of constitutional magnitude similar to those giving rise to the holdings in United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); and Crowe v. State, 86 S.D. 264, 194 N.W.2d 234 (1972).

MORGAN, Justice (dissenting).

I join specially in the dissent of Henderson, Justice.

First, I would agree that some sentences could be constitutionally invalid. However, lest we open a new flood gate of appeals on sentencing, I would anticipate that review would not be necessary except upon imposition of life imprisonment or the death penalty.

With respect to this case, I too think the trial judge went too far. I agree with the trial judge's comments as far as they went. As I read the record, he had a 36-year-old man who had spent a good part of the previous 15 years in the state penitentiary. He apparently has an alcohol

problem; at least he and his counsel injected that into the record.* However, almost all the previous offenses for which he had been convicted involved money or property as did the one for which he was being sentenced. True, the law protects property and property interests, but I consider life imprisonment to be a sentence that should be reserved for offenses against persons. Certainly, such a sentence should be supported by a much more extensive record demonstrating a more compelling reason than mere recidivism and further demonstrating that the sentencing judge had imposed the maximum sentence only after contemplative deliberation considering all possible alternatives. The record before us demonstrates a rather summary decision from the bench.

I would remand for resentencing.

HENDERSON, Justice (dissenting).

---

* Defendant did not consent to a presentence investigation that might have substantiated that assertion.

The defendant was sentenced to life imprisonment in the South Dakota State Penitentiary after pleading guilty to a charge of uttering a no account check of $100.00 and entering an admission of guilt to being a habitual offender. SDCL 24-15-4 provides: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." Executive clemency is his only avenue of hope. As I attempt to arrive at a sense of fairness in the administration of justice in this case, this statute weighs heavily on my conscience.

At the time of sentencing, the court asked defendant if he had anything he wanted to say. He replied, "No," whereupon the court pronounced sentence.

> THE COURT: Well, I guess most anybody looking at this record would have to acknowledge you have a serious problem, if you've been drinking all of this time and your prior imprisonments have not had any effect on your drinking problem, so far as motivating you for change. If you get out in the near future, you're going to be committing

> further crimes, so I can't see any purpose in my extending any leniency to you at all here and I intend to give you a life sentence.
>
> It will be up to you and the parole board to work out when you finally get out, but I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over.

The sentence of the trial court cannot be anticipatory of the compassion of the State Board of Pardons and Paroles, for when a defendant is sentenced to lifetime imprisonment, it is beyond its jurisdiction to grant parole. Nor should this court contemplate a possible commutation of sentence through a grant of executive clemency. It is incumbent upon this court to determine the propriety of such a sentence at this juncture; another branch of government should not be burdened with rectifying this injustice.

I agree with the majority opinion that the sentence is severe. It is so severe and extreme that I find it constitutionally offensive. While this court has been traditionally reluctant to disturb a sentence on appeal, we nonetheless have long recognized the vagaries that inhere in the sentencing process. We stated in State v. Bad Heart Bull, 257 N.W.2d 715, 720 (S.D. 1977): "Although punishment by imprisonment is not per se cruel and unusual it may be constitutionally offensive when the duration of the sentence prescribed is so excessive or disproportionate to the crime as to shock 'the conscience and reason of men generally,'" citing State v. Becker, 3 S.D. 29, 40, 51 N.W. 1018, 1022 (1892). I do not choose to be shackled by the precedent of this court, namely, that a sentence within the statutory limits will not be disturbed on appeal. I find the language of the majority opinion especially alarming in light of the reenactment of the death penalty in this state. There

are instances, though rare, where departure from this precedent is mandated. Thus, the discretion of the trial court is not boundless, nor is the function of this court merely perfunctory with regard to the review of a criminal sentence.

The United States Supreme Court has firmly embraced the concept that the Eighth Amendment bars not only punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977); Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed2d 346 (1972); Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1957). Although the United States Supreme Court has yet to hold a sentence cruel and unusual on the basis of length alone, its reasoning has suggested that a disproportionately long sentence would not be immune from Eighth Amendment challenge. "[I]t is a precept

of justice that punishment for crime should be graduated and proportioned to [the] offense." Weems v. United States, 217 U.S. 349, 367, 30 S.Ct. 544, 549, 54 L.Ed. 793, 798 (1910).

The proscriptions embodied in the Eighth Amendment have broad application; the clause "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." Weems v. United States, 217 U.S at 378, 30 S.Ct. at 553, 54 L.Ed. at 803. As stated by Mr. Chief Justice Warren, in an oftquoted phrase, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. at 101, 78 S.Ct. at 598, 2 L.Ed.2d at 642. Thus, the application of the Eighth Amendment involves an assessment of contemporary values that reflect the public attitude toward a given sanction.

We must not lose sight of the basic concept of the Eighth Amendment, namely, that a penalty

must accord with "the dignity of man." Trop v. Dulles, supra. This has been interpreted to mean in one respect that the punishment not be "excessive." Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Under Gregg, a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the pointless infliction of suffering; or (2) is grossly disproportionate to the severity of the crime.

In Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 983, 94 S.Ct. 1577, 39 L.Ed.2d 881 (1974), the Fourth Circuit set forth four factors, central to the Supreme Court's major decisions applying the cruel and unusual punishment clause, in determining whether the length of the sentence imposed under the West Virginia recidivist statute was cruel and unusual because it was grossly disproportionate to the crimes involved. The Fourth Circuit considered

cumulatively: (1) the nature of the offense; (2) the legislative intent behind the punishment; (3) the punishment defendant would have received in other jurisdictions; and (4) the punishment meted out for other offenses within the same jurisdiction. The analysis in Hart was adopted by the Fifth Circuit in Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1978).

The factual situations in both Hart and Rummel bear a striking resemblance to the instant case. The Fifth Circuit concluded that Rummel's life sentence for the three crimes of obtaining money under false pretenses, intent to defraud, and passing a forged instrument was so grossly disproportionate to the offense as to constitute cruel and unusual punishment in violation of the Eighth Amendment. Likewise, in Hart, the court held that life imprisonment based on defendant's convictions of committing perjury, writing a check on insufficient funds and interstate transportation

of forged checks was constitutionally excessive and wholly disproportionate to the nature of the offenses committed, and not necessary to achieve any legitimate legislative purpose.

A life sentence in South Dakota, at the time sentence was imposed herein, could be imposed on any person convicted of a Class A felony (murder) and upon any person convicted of a Class 1 felony (manslaughter in the first degree, kidnapping, arson in the first degree). Although I do not condone the issuance of worthless checks, I think it is significant that this case involves one of the most passive felonies a person could commit. The trial court equated the gravity of this offense with the most serious felonies in our state. This is why I believe it is vastly disproportionate to the crime committed and shocking to the "conscience and reason of men generally."

Defendant was previously convicted of six felonies: three third-degree burglaries; obtaining money under false pretenses; grand larcency; and

a felony DWI. Defendant is an alcoholic; in each prior conviction, alcohol had contributed to his problems with law and society. In describing the facts leading to his conviction in this case, defendant stated: "I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places."

The defendant's history and the facts of this case mitigate against a prison cell for life. I do not presume to fully address the complex socxio-philosophical questions presented by this case; whether imprisonment is intended to serve a rehabilitative, retributive, or deterrent purpose, I leave to the legislature and sociologists. Neither is it my role to say what effect a defendant's recidivism should properly have upon the

sentencing process. I simply point out that all defendant's offenses were alcohol-related and involved money or property. He has been in and out of our state penitentiary several times. Notwithstanding, he has remained an alcoholic and compulsive check writer. Does justice require that after a certain point is reached, we just turn the key--lock the defendant up to languish in prison for a lifetime--and close the final chapter on his life? I cannot agree that justice dictates this result.

The sentence imposed is so excessive that it reaches constitutional dimension. I would reverse and remand the case for the limited purpose of resentencing this defendant proportionate to the offense. Defendant, if he rehabilitates himself, should at lease be given an opportunity to obtain parole during his lifetime.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JERRY BUCKLEY HELM, Appellant, v. HERMAN SOLEM, Warden, South Dakota State Penitentiary, Appellee.	CIV NO. 82-1039-SD MOTION FOR TECHNICAL CORRECTION

COMES NOW the Appellee, by and through his attorney Grant Gormley, Assistant Attorney General, pursuant to Rule 15 of the Rules of the United States Court of Appeals for the Eighth Circuit, and applies to this Court for a technical correction in its written opinion filed August 4, 1982, in the above-entitled matter.

At page 8, footnote 6 of its opinion, the Court states as follows:

> The statistics indicate that 22 prisoners in the South Dakota penitentiary had their life sentences commuted between

> 1964 and 1975. The statistics, however, do not indicate what percentage of requests during this same time period were denied. Moreover, since 1975, the Governor of South Dakota has commuted no life sentences but has denied requests for commutation of life sentences from 25 prisoners, including Helm.

In order to present a more accurate depiction of the data, Appellee respectfully requests that the above language be amended to read as follows:

> The statistics indicate that 22 prisoners in the South Dakota penitentiary had their life sentences commuted between 1964 and 1975. During the same time period, commutation requests from 12 prisoners were denied. Moreover, since 1975, the Governors of the State of South Dakota have commuted no life sentences but have denied requests for commutation of life sentences from 25 prisoners (the above 12 plus 13 more) including Helm. In sum, during the total time period for which statistics were made available, 22 life sentences were commuted while 25 life sentences were not.

WHEREFORE, Appellee prays that this Court technically correct its Footnote 6 in the above-entitled opinion.

Dated this 10th day of August, 1982.

Grant Gormley
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
Telephone (605) 773-3215

Attorney for Appellee

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JERRY BUCKLEY HELM, Appellant, v. HERMAN SOLEM, Warden, South Dakota State Penitentiary, Appellee.	)	CIV NO. 82-1039-SD MEMORANDUM IN SUPPORT OF MOTION FOR TECHNICAL CORRECTION

I

THE STATISTICS, HOWEVER, DO NOT INDICATE WHAT PERCENTAGE OF REQUESTS DURING THIS SAME PERIOD WERE DENIED.

It is the State's contention that the above sentence mistates the facts presented to this Court by the Affidavits of Ben Dearduff. The Dearduff affidavit of May 3, 1982, shows that the commutation requests of 12 prisoners (1. Brim, 2. Shaffer, 3. Nelson, 4. Percy, 5. White Hawk, 6.

Aschmeller, 7. Pickering, 8. Coryell, 9. Faller, 10. Procter, 11. Thibodeau, and 12. Hamm) were denied during the period from 1964 to 1975 inclusive.

II

MOREOVER, SINCE 1975, THE GOVERNOR OF SOUTH DAKOTA HAS COMMUTED NO LIFE SENTENCES BUT HAS DENIED REQUESTS FOR COMMUTATION OF LIFE SENTENCES FROM 25 PRISONERS, INCLUDING HELM.

The State would, first of all, point out that it has had three governors during the time in question, and, therefore, believes the sentence should read "Governors."

The State also believes that the language of this sentence should be expanded to indicate that the 25 prisoners mentioned include the 12 who had previously had their commutation requests denied. Otherwise, the misimpression is given that a wholly new 25 prisoners have requested and not received commutation of their life sentences. Or said another way, the number and

identities of the prisoners who have had their commutation requests denied since 1964 is the same as since 1975.

Finally, the State believes that a final sentence comparing the 22 sentences commuted with the 25 sentence not commuted (since 1964) is in order to fairly represent the facts presented to the Court. Otherwise, the Court by instituting an arbitrary 1975 dividing line in the 1964 to 1982 continuum has selected, without legal justification, a categorization ostensibly detrimental to the State's position.

WHEREFORE, Appellee prays that its Motion for Technical Correction, or any part thereof, be granted.

Dated this 10th day of August, 1982.

Grant Gormley
Assistant Attorney General

Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Motion for Technical Correction and Memorandum in Support of Motion for Technical Correction in the case of Jerry Buckley Helm v. Herman Solem, were served by United States mail, first class, postage prepaid, upon Mr. John J. Burnett, Attorney at Law, Pennington County Courthouse, Rapid City, South Dakota 57701, on this 10th day of August, 1982.

Grant Gormley
Assistant Attorney General

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 82-1039 September Term, 1981

Jerry Helm, Appellant,	)
	) Appeal from the United States
vs.	) District Court for District of
Herman Solem, Warden South Dakota State Penitentiary, Sioux Falls, SD, Appellee.	) South Dakota

On motion of appellant, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

August 26, 1982

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 82-1039 September Term, 1981

Jerry Helm, Appellant,	)
	) Appeal from the United States
vs.	) District Court for
	) District of
Herman Solem, Warden etc., Appellee.	) South Dakota

It is now here ordered that appellee's motion for technical correction of footnote 6 be, and its is hereby, denied.

September 3, 1982

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

JERRY BUCKLEY HELM, Petitioner,	)	CIV 82-5148
v.	)	ORDER
HERMAN SOLEM, ETC., ET AL., Respondents.	)	

The Petitioner has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court having considered Petitioner's application for habeas corpus and reviewed his conviction and sentence, it is hereby

ORDERED that the Petitioner's application for habeas corpus be, and hereby is denied, for the reasons set forth in this Court's Memorandum Opinion filed this date in the case herein.

Dated this 2nd day of December, 1981.

BY THE COURT:

Andrew W. Bogue
Chief Judge

ATTEST:

WILLIAM F. CLAYTON, Clerk

BY: Cindy Fagot Deputy

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

JERRY BUCKLEY HELM, Petitioner,	)	CIV 82-5148
v.	)	MEMORANDUM OPINION
HERMAN SOLEM, ETC., ET AL., Respondents.	)	

On April 18, 1979, the Petitioner plead guilty to the crime of uttering a no account check. He also admitted to convictions for six previous felonies and was adjudged an habitual offender. Judge Parker sentenced the Defendant to life imprisonment in the State Penitentiary. The Petitioner appealed this life sentence and on January 16, 1980, the South Dakota Supreme Court affirmed the conviction and sentence. The Petitioner has, therefore, petitioned this Court for a writ of habeas corpus under 28 U.S.C. §

2254. In support of his Petition, the Petitioner offers two grounds: (1) He contends that the sentence imposed constituted cruel and unusual punishment under the eighth and fourteenth amendments; and (2) he contends that the trial court denied him due process of law under the fifth and fourteenth amendments by imposing the maximum allowable sentence without conducting an investigation into the Defendant's background or character beyond what was alleged in the information. The State has opposed the Petition by denying that the Petitioner's constitutional rights were violated. Additionally, the State contends that the Petitioner failed to exhaust all available state remedies and that his Petition for habeas corpus relief under § 2254 is premature.

Initially, this Court is satisfied that the Petitioner has exhausted his state remedies. It is true that the Petitioner did not seek post conviction review in the state system concerning the

points he now raises in his writ of habeas corpus. Post conviction review is not required by this Court to consider his claims. In Havens v. Solem, 455 F.Supp. 1132 (D.C. S.D. 1978), Judge Nichol correctly observed that the rule in South Dakota is that "When a defendant has taken an appeal from his conviction, the post-conviction statutes cannot be used to secure a second review of issues finally decided on the appeal." Id. at 1134. See also, Zemina v. Solem, 438 F.Supp. 455, 463 (D.S.D. 1977), aff'd 573 F.2d 1027 (8th Cir. 1978). Having read the opinion of the South Dakota Supreme Court in State v. Helm, 287 N.W.2d 497 (S.D. 1980), this Court is satisfied that the South Dakota Supreme Court considered the Defendant's challenges to the constitutional validity of his sentence. The Eighth Circuit Court of Appeals likewise holds that the Petitioner need not pursue post-conviction proceedings concerning matters settled on direct appeal. See,

Maggitt v. Wyrick, 533 F.2d 383 (8th Cir. 1976), cert. denied 429 U.S. 898 (1976). Therefore, this Court may examine the merits of Petitioner's claims.

Petitioner's first claim is that the sentence imposed constituted cruel and unusual punishment under the eighth and fourteenth amendments. In Rummel v. Estelle, ___ U.S. ____, 100 S.Ct. 1133 (1980), the United States Supreme Court held that a mandatory life sentence imposed under a Texas recidivist statute following the defendant's third felony conviction for obtaining $120.75 by false pretences did not constitute cruel and unusual punishment under the eighth and fourteenth amendments. The decision of the court in Rummel clearly governs the Petitioner's first claim.

This Court agrees that the sentence imposed by Judge Parker was harsh. But the Defendant apparently was informed on three occasions that his guilty plea would trigger the habitual offender

statute and that he could be sentenced to life imprisonment. The goal of the habitual offender statute is to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that preson from the rest of society for an extended period of time. 100 S.Ct. at 1144. The sentence imposed by Judge Parker was within the statutory limits and the length of the sentence for a given offense is purely a matter of legislative prerogative. Finally, this Court must repeat the statement of Justice Stewart in the Rummel case. He stated, ". . . the question for decision is not whether we applaud or even whether we personally approve the procedures followed in this case. The question is whether those procedures fall below the minimum level the Constitution will tolerate." 100 S.Ct. at 1145. In answer to that question, the Court must concur with the judgment of both the

United States Supreme Court and the South Dakota Supreme Court, that the sentence imposed in this case, based upon the habitual offender statute, does not constitute cruel and unusual punishment under the eighth and fourteenth amendments.

The Petitioner's second claim is that he was denied due process of law under the fifth and fourteenth amendments when Judge Parker imposed the maximum sentence allowable under the habitual offender statute without any investigation into the Petitioner's background or character beyond what was alleged in the information. First, this Court's standard of review under 28 U.S.C. § 2254 is a determination whether "trial errors or irregularities infringe upon a special constitutional protection or are so prejudicial as to amount to a denial of due process." Havens v. Solem, 455 F.Supp. at 1134. The trial judge possesses broad discretionary powers to consider

certain information as it may affect the sentence the court ultimately imposes. This Court is not convinced that Judge Parker abused his discretion. Further, the South Dakota Supreme Court observed that the "Defendant waived his right to a preliminary hearing, insisted on pleading guilty, refused a presentence investigation and demanded immediate sentencing." 287 N.W.2d at 498. Since the Defendant refused to consent to a presentence investigation, he cannot now be heard to complain that Judge Parker did not consider information concerning the Defendant's background or character which such a presentence investigation might have disclosed. It also appears that Judge Parker gave the Petitioner the opportunity to speak on his own behalf. The Court pronounced sentence only after the Petitioner declined to respond. Clearly, the Petitioner was given the opportunity to introduce any information he believed the Judge should have considered prior to imposing sentence. With

respect to his second claim, the Petitioner has simply failed to establish any matter in the trial record which discloses that he was deprived of any federal constitutional right amounting to a denial of due process of law.

Thus, because the Petitioner has not presented a claim which would require the issuance of a writ of habeas corpus, his petition for a writ of habeas corpus is hereby denied.

The foregoing constitutes this Court's findings of fact and conclusions of law

Dated this 2nd day of December, 1981.

BY THE COURT:

Andrew W. Bogue
Chief Judge

ATTEST:

WILLIAM F. CLAYTON, Clerk

BY: Cindy Fagot Deputy

Office-Supreme Court, U.S.
FILED
DEC 29 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-492

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

JERRY BUCKLEY HELM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

MARK V. MEIERHENRY
ATTORNEY GENERAL

Grant Gormley
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501
Telephone (605) 773-3215
Counsel for Petitioner

John J. Burnett
Attorney at Law
County Courthouse
Rapid City, South Dakota
57701
Telephone (605) 394-2181

Counsel for Respondent

Petition for Certiorari filed September 20, 1982
Certiorari granted November 8, 1982

TABLE OF CONTENTS

	PAGE
RELEVANT DOCKET ENTRIES	1
ORDER TO PROCEED IN FORMA PAUPERIS	2
PETITIONER'S APPLICATION FOR HABEAS CORPUS RELIEF	3
RESPONDENTS' ANSWER TO PETITIONER'S APPLICATION FOR HABEAS CORPUS	14
NOTICE OF APPEAL	18
AFFIDAVITS OF BEN DEARDUFF	20
JUDGMENT FINDING FOR PETITIONER	30

THE FOLLOWING MATERIAL WAS REPRODUCED IN THE PETITION FOR WRIT OF CERTIORARI AND WILL NOT BE PLACED IN THE JOINT APPENDIX. THE DOCUMENT IS FOLLOWED BY THE APPROPRIATE PAGE NUMBER FROM THE PETITION FOR WRIT OF CERTIORARI WHERE THE DOCUMENT IS LOCATED.

STATE COURT DECISION	A-22
MEMORANDUM OPINION FINDING FOR RESPONDENT AND AGAINST PETITIONER	A-52
ORDER DENYING PETITIONER'S APPLICATION FOR HABEAS CORPUS	A-50
OPINION GRANTING PETITIONER HABEAS CORPUS RELIEF	A-1
MOTION FOR TECHNICAL CORRECTION	A-41

MEMORANDUM IN SUPPORT OF MOTION FOR TECHNICAL CORRECTION A-44

STAY OF COURT'S MANDATE GRANTED A-48

MOTION FOR TECHNICAL CORRECTION DENIED A-49

RELEVANT DOCKET ENTRIES

DOCKET ENTRY	DATE
State Court Decision	January 16, 1980
Order to Proceed In Forma Pauperis	October 30, 1981
Petitioner's Application for Habeas Corpus relief filed	November 2, 1981
Respondents' Answer to Petitioner's Application for Habeas Corpus	November 6, 1981
Memorandum Opinion finding for Respondent and against Petitioner	December 2, 1981
Order Denying Petitioner's Application for Habeas Corpus	December 2, 1981
Notice of Appeal	December 29, 1981
Affidavits of Ben Dearduff	May 6, 1982
Opinion Granting Petitioner Habeas Corpus Relief	August 4, 1982
Judgment finding for Petitioner	August 4, 1982
Motion for Technical Correction	August 12, 1982
Memorandum in Support of Motion for Technical Correction	August 12, 1982
Stay of Court's Mandate granted	August 26, 1982
Motion for Technical Correction denied	September 3, 1982

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Jerry Buckley Helm,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
South Dakota State Penitentiary,	)	
	)	
Respondent.	)	

The Petitioner having moved this Court for its Order granting his motion to proceed in forma pauperis in his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, and good cause appearing, it is hereby

ORDERED that the Petitioner's motion to proceed in forma pauperis be, and hereby is, granted.

Dated this 30th day of October, 1981.

BY THE COURT:

ANDREW W. BOGUE
CHIEF JUDGE

ATTEST:
WILLIAM F. CLAYTON, Clerk
By BETTY B. BERRY Deputy

FORM FOR USE IN APPLICATIONS

FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254

Jerry Buckley Helm
Name

19446
Prison Number

South Dakota State Penitentiary

Sioux Falls, South Dakota
Place of Confinement

United States District Court _____
District of _____

Case No. _____
(To be supplied by Clerk of U.S. District Court)

JERRY BUCKLEY HELM, PETITIONER
(Full name) (Include name under which you were convicted)

V.

HERMAN SOLEM, Warden of the South Dakota State Penitentiary, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF South Dakota, ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the future,

petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. § 2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

INSTRUCTIONS--READ CAREFULLY

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and subscribed to under penalty of perjury as being true and correct. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.

(2) Additional pages are not permitted. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an

authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $_____, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is

_____
_____
_____.

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack Circuit Court, Seventh Judicial Circuit, Rapid City, South Dakota.

2. Date of judgment of conviction April 18, 1979.

3. Length of sentence Life

   Sentencing judge Thomas Parker

4. Nature of offense or offenses for which you were convicted: Uttering a No Account Check--Habitual Offender.

5. What was your plea? (Check one)
   (a) Not guilty ( )
   (b) Guilty (x)
   (c) Nolo contendere ( )
   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   _____
   _____
   _____
   _____

6. Kind of trial: (Check one)
   (a) Jury ( )
   (b) Judge only (x)

7. Did you testify at the trial? Yes (x) No ( )

8. Did you appeal from the judgment of conviction? Yes (x) No ( )

9. If you did appeal, answer the following:
   (a) Name of court South Dakota Supreme Court
   (b) Result Judgment Affirmed
   (c) Date of result January 16, 1980
   If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: N/A

   _____
   _____
   _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes ( ) No (x)

11. If your answer to 10 was "yes", give the following information:
(a) (1) Name of court _____
(2) Nature of proceeding _____
_____
(3) Grounds raised _____
_____
_____
_____
_____
_____
_____
(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )
(5) Result _____
_____
(6) Date of result _____
(b) As to any second petition, application or motion give the same information:
(1) Name of court _____
_____
(2) Nature of proceeding _____
_____
_____
(3) Grounds raised _____
_____
_____
_____
_____
_____
_____
_____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

(5) Result _____

_____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

_____

(3) Grounds raised _____

_____

_____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

(5) Result _____

(6) Date of result _____

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes ( ) No ( )

(2) Second petition, etc. Yes ( ) No ( )

(3) Third petition, etc. Yes ( ) No ( )

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____

_____

_____

_____

_____

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of

the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendnent claim].

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which has unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: The sentence imposed constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments.
Supporting FACTS (tell your story briefly without citing cases or law): Defendant was sentenced to life in prison for writing a $100.00 no account check because he had six prior felony convictions which were alleged in the Habitual Offender Information. Life in prison means the defendant is not eligible for parole ever. All prior offenses

were non-violent, alcohol related (3° Burglary, Obtaining Money under False Pretenses, Grand Larceny, Felony Driving WhileUnder the Influence of Alcohol).

B. Ground two: The sentencing procedure denied the defendant due process of law under the Fifth and Fourteenth Amendments.

Supporting FACTS (tell your story briefly without citing cases or law): The sentencing judge imposed the maximum sentence allowable under the law (life in prison) withoutany investigation into defendant's background of character beyond what was alleged in the Information.

C. Ground three: _____

_____

_____

Supporting FACTS (tell your story briefly without citing cases or law):

_____

_____

_____

_____

_____

D. Ground four: _____

_____

_____

Supporting FACTS (tell your story briefly without citing cases or law):

_____

_____

_____

_____

_____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly

what grounds were not so presented, and give your reasons for not presenting them:

_____
_____
_____
_____
_____
_____
_____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No ( )

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
    (a) At preliminary hearing Not Applicable
    (b) At arraignment and plea Joseph Neiles, 505 West Ninth Street, Sioux Falls, South Dakota 57104.
    (c) At trial Not Applicable
    (d) At sentencing Joseph Neiles
    (e) On appeal Joseph Neiles
    (f) In any post-conviction proceeding Not Applicable
    (g) On appeal from any adverse ruling in a post-conviction proceeding: Not Applicable

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes (x) No ( )

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (x)
    (a) If so, give name and location of court which imposed sentence to be served in the future: _____
    _____

(b) And give date and length of sentence to be served in future: _____

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No ( )

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 15, 1981
(Date)

Jerry Buckley Helm
(Signature)

_____
Signature of Attorney
(if any)

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

JERRY BUCKLEY HELM, Petitioner, v. HERMAN SOLEM, Warden, South Dakota; and MARK V. MEIERHENRY, Attorney General, State of South Dakota, Respondents.	)	CIV 81-5148 RESPONDENTS' ANSWER TO PETITIONER'S APPLICATION FOR HABEAS CORPUS (28 U.S.C.A. § 2254)

TO THE HONORABLE ANDREW W. BOGUE, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA:

COMES NOW the Respondents, Herman Solem and Mark V. Meierhenry, by and through their attorney, Grant Gormley, Assistant Attorney General, and submit the following Answer to Petitioner's Application for Habeas Corpus under 28 U.S.C.A. § 2254, alleging that:

1. The sentence imposed on Petitioner was not cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. (Rummel v. Estelle, 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980)).

2. The procedure, under which Petitioner was sentenced, does not violate the due process clauses of the Fifth and Fourteenth Amendments.

FURTHERMORE, in accordance with Rule 5 of the Rules Concerning § 2254 Cases in the United States District Courts, Respondents inform the Court that:

1. To the best of Respondents' knowledge, Petitioner has not exhausted all available state remedies before applying to this Court for habeas corpus relief under 28 U.S.C.A. § 2254.

2. Available transcripts include all documents contained in the Petitioner's case file, on file with the Pennington County Clerk of Courts.

These records are now in the possession of Respondents' attorney and will be provided upon request of this court.

3. No portions of the trial transcript are appended.

WHEREFORE, Respondents pray that Petitioner's application be denied.

Dated this 4th day of November, 1981, at Pierre, South Dakota.

Grant Gormley
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
Telephone: (605) 773-3215

Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondents' Answer to Petitioner's Application for Habeas Corpus under 28 U.S.C.A. § 2254 and in the case of Jerry Buckley Helm v. Herman Solem and Mark V. Meierhenry, CIV 81-5148 was served by United States mail, first class, postage prepaid, upon Mr. John J. Burnett, Pennington County Courthouse, Rapid City, South Dakota 57701 on this 4th day of November, 1982.

Grant Gormley
Assistant Attorney General

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

File Number: CIV 81-5148

JERRY BUCKLEY HELM, Petitioner V. HERMAN SOLEM, Warden, South Dakota State Penitentiary, Sioux Falls, South Dakota, Respondent.	NOTICE OF APPEAL

Notice is hereby given that Jerry Buckley Helm, Petitioner above-named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the Order Denying Petitioner's application for a Writ of Habeas Corpus entered in this action on the 2nd day of December, 1981.

A Petition for Certificate of Probable Cause for Appeal was filed in this action on December 11, 1981.

Dated this 29th day of December, 1981.

John J. Burnett
Attorney for Petitioner

OFFICE OF THE PUBLIC
DEFENDER FOR PENNINGTON
COUNTY
Room # 44
Pennington County Courthouse
Rapid City, South Dakota 57701

*
*
*
*
*
*
*

AFFIDAVIT OF
BEN DEARDUFF

* *

I, Ben Dearduff, being first duly sworn upon oath, do depose and state as follows:

That I am employed as the Legal Liaison Officer of the South Dakota State Penitentiary and that as such Legal Liaison Officer I am thoroughly familiar with the record keeping system at said penitentiary.

That I personally researched the records of the South Dakota State Penitentiary and that the two (2) charts entitled COMMUTATION OF LIFE SENTENCE CHART and INMATES SERVING LIFE SENTENCES ON MAY 3, 1982, attached hereto and by this reference incorporated herein, are a complete and accurate disclosure of the information contained in such records regarding:

(1). Every inmate who received a life sentence to the South Dakota State Penitentiary prior to March 1, 1964, and who subsequently received a commutation of such life sentence after March 1, 1964, up to and including the date of this affidavit and

(2). Every inmate now serving a life sentence in the South Dakota State Penitentiary, the date said inmate was received, the date(s) said inmate was denied a commutation of said life sentence, and any other concurrent or consecutive sentences said inmate is serving.

/s/ Ben Dearduff
Ben Dearduff
Affiant

Subscribed and sworn to before me this 3rd day of May, 1982.

/s/ Aldon Lee Meirose

My Commission Expires July 9, 1988

Percy, Dale	7-3-63	1-28-72 6-15-72 9-22-72 1-25-73 6-21-73 9-29-73 1-24-74 9-27-74 1-23-75 5-22-75 9-25-75 1-29-76 5-21-76 9-16-76 1-28-77 5-26-77 9-22-77 2-24-78 5-18-79 1-25-80 1-23-81 2-22-82	
White Hawk, Thomas	1-15-68	5-25-73 9-20-73 2-22-74 10-25-74 2-21-75 7-25-75 4-23-76 5-18-78	Commuted from Death to Life 1969
Kingston, Richard	2-13-68	Never Applied	20 year concurrent sentence
Kindvall, Denver	3-7-70	9-28-78 9-29-79 10-24-80 9-28-81	
Aschmeller, Dale	6-10-71	9-20-73 5-24-74 9-24-74 6-17-75 1-29-76	

INMATES SERVING LIFE SENTENCES ON MAY 3, 1982

INMATE'S NAME	DATE RECEIVED	DATE DENIED COMMUTATION	OTHER SENTENCES
Werner, Max	4-14-39	1-29-76 9-28-78 5-22-80	
Haas, Clifford	12-7-43	5-22-80	
Brim, Robert	11-3-58	1-26-73 5-25-73 9-21-73 5-24-74 2-21-75 6-16-75 11-21-75 2-20-76 5-20-76 9-16-76 1-27-77 6-23-77 9-22-77 3-30-78 1-25-79 5-23-80 5-29-81	
Shaffer, Otis	4-15-63	2-22-74 6-28-74 1-23-75 7-29-77	
Nelson, James	6-10-63	1-22-65 5-27-66 9-23-66 1-24-67 5-26-67 1-23-70 5-22-75 9-25-75 2-19-76 5-21-76 9-16-76 1-28-77	20 year concurrect sentence

Stumes, Norman	3-27-74	Never Applied	3 year consecutive sentence
Satter, Steven	5-10-74	Never Applied	Life sentence concurrent
Hamm, Billy (F)	5-20-74	1-23-75 5-21-76 9-22-77 9-28-78 9-27-79 9-26-80 9-28-81	5 year concurrent sentence
Wood, Gary	7-22-74	6-18-76	
Bush, Alonzo	9-14-75	Never Applied	
Marshall, Richard	4-9-76	12-17-76 9-28-81	
Roggenkamp, Mary	5-10-76	5-26-77 6-23-78 5-22-80 5-29-81	20 year concurrent sentence
Jenkins, David	10-30-76	Never Applied	
Kaseman, Steven	5-26-77	Never Applied	
Martin, John	7-22-77	Never Applied	
Vassar, Jerry	2-9-78	9-29-79 1-23-81 2-22-82	12 year concurrent sentence
Downs, Tommy	3-13-78	9-28-78 9-28-79 9-26-80 10-23-81	5 year concurrent sentence
Kost, Leonard	5-8-78	5-18-79 6-27-80 5-28-81 2-22-82	
Cowell, James	6-13-78	2-16-79 2-29-80	

Aschmeller, Dale (con't)		8-27-76 1-28-77 7-29-77 1-26-78 1-25-79 1-25-80 1-23-81 1-22-82	
Pickering, Patrick	9-18-72	5-24-74 9-29-81	42 year concurrent sentence
Coryell, Frank	11-2-72	9-27-74 6-16-75 8-27-76 1-28-77 12-16-77 9-28-78 10-28-79 1-23-81	
Faller, Larry	5-29-73	10-24-75 6-23-77 1-26-78 2-29-80 1-23-81 2-22-82	10 year concurrent sentence
Adkins, Manford	7-19-73	Never Applied	4 life concurrect sentences
Withorne, Harald	11-23-73	Never Applied	
Proctor, John	11-30-73	5-24-74 6-16-75 8-21-76 5-18-78 2-29-80 10-23-81	2 year concurrent sentence
Thibodeau, Floyd	12-5-73	5-24-74 2-21-75 4-23-76 11-18-76 10-26-79 10-24-80	

Helm, Jerry	4-19-79	5-28-81	
Ristau, Donald	5-17-79	Never Applied	
Curtis, John	2-6-80	Never Applied	25 year concurrent sentence
Standing Soldier, Michael	2-21-80	Never Applied	2@ 25 year & 1 life sentence concurrent
Gregory, Garland	4-21-80	1-23-81 2-22-82	
Garritsen, David	5-2-80	Never Applied	20 year & life sentence concurrent
Lufkins, Dennis	7-15-80	Never Applied	2@ 10 year concurrent sentences
Cody, William	9-24-80	Never Applied	
Howard, Jeffery	8-4-81	Never Applied	
Lohnes, Burton	8-26-81	Never Applied	
Bradford, Gerald	9-10-81	Never Applied	
Caffery, Timothy	12-10-81	Never Applied	
Primeaux, Roscoe	12-30-81	Never Applied	1 - 4 year & 1 - 6 year concurrent sentences

*
*
*
*
* AFFIDAVIT OF
* BEN DEARDUFF
*

* *

I, Ben Dearduff, being first duly sworn upon oath, do depose and state as follows:

That I am employed as the Legal Liaison Officer of the South Dakota State Penitentiary and that as such Legal Liaison Officer I am thoroughly familiar with the record keeping system of the South Dakota State Penitentiary.

That I personally researched the records of the South Dakota State Penitentiary and that the "COMMUNTATION OF LIFE SENTENCE CHART", attached hereto and by this reference incorporated herein, is a complete and accurate disclosure of the information contained in such records regarding every inmate who received a "life" sentence prior to March 1, 1964, and who subse-

quently received a commutation of such life sentence after March 1, 1964, up to and including the date of this affidavit.

/s/ Ben Dearduff
Ben Dearduff
Affiant

Subscribed and sworn to before me this 28th day of April, 1982.

(SEAL) Subscribed and sworn to before me this 28th day of April, 1982

/s/ Aldon Lee Meirose
Notary Public, Minnehaha County
South Dakota
My Commission Expires July 9, 1988

[THIS PAGE INTENTIONALLY LEFT BLANK]

COMMUTATION OF LIFE SENTENCE CHART

INMATE'S NAME	DATE RECEIVED	DATE SENTENCE COMMUTED	DATE PAROLED	DATE OF DISCHARGE	OTHER
Erwin, Earl	4-21-55	10-1-64		9-9-69	
Greycloud, Robert	5-3-52	1-29-65	4-20-67	5-13-79	
Rasch, Selmer	5-3-44	6-10-68	9-9-68	4-3-91	
Elsing, Harry	6-18-61	11-7-69	12-23-69	6-18-83	
Reddington, Harold	5-17-62	11-7-69	12-29-69	8-29-73	
Sanders, Carl	8-25-61	2-5-70	4-1-71		Deceased
Landry, David	5-25-56	10-12-70	3-29-72	10-25-75	
Morgan, Wayne	5-25-56	10-12-70	11-30-71	10-25-76	
Ziegler, Ken	3-1-61	6-2-71	8-2-72		Deceased
Trujillo, Danny	1-17-63	10-11-71	7-10-73	6-17-82	
West, James	6-10-63	10-5-71			Rel on Writ
Parker, John	11-10-50	2-14-72	5-4-72	11-7-73	
McMullin, William	6-28-57	2-14-72	9-24-73	5-29-89	
Reiser, Duane	11-27-62	2-14-72	12-14-73	10-27-99	
Crook, Jody	2-10-58	2-23-73	3-3-73	7-10-77	
Dove, Hugo	6-1-55	6-20-73	12-23-75		Deceased
Huber, Paul	3-12-58	6-20-73	4-30-74	2-12-2005	
Bush, Jerry	10-21-60	2-19-74	4-30-74	3-21-2012	
Johnson, Darrell	2-17-64	3-15-74	7-2-81	1-17-2016	
Thwing, Robert	4-22-52	6-12-74	7-26-74	9-22-96	
Ottoson, Dennis	11-2-62	11-7-74	11-26-74	10-2-2009	
Christensen, Howard	6-5-37	3-7-75			

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1039 September Term, 1981

Jerry Helm,

Appellant,

vs.

Herman Solem, Warden, South Dakota State Penitentiary, Sioux Falls, SD,

Appellee

This appeal from the United States District Court for the District of South Dakota was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, reversed and remanded to the said District Court with directions to issue the writ if, within sixty

days from the issuance of our mandate, the State has not resentenced Helm.

August 4, 1982

A True Copy:
ATTEST: /s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

8

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 82-492

RECEIVED
DEC 20 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

HERMAN SOLEM, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY,
Petitioner,

vs.

JERRY BUCKLEY HELM,
Respondent.

MOTION FOR
APPOINTMENT OF COUNSEL

John Joseph Burnett, Director of the Pennington County Public Defender's Office, moves this Court for an order appointing John Joseph Burnett of the Pennington County Public Defender's Office, as Respondent's counsel under Supreme Court Rule 46, upon the reason and upon the grounds as follows:

1. On November 8, 1982, this Court granted Certiorari and also granted leave to proceed in forma pauperis to Respondent.

2. This case involves the validity of a state criminal judgment and of a Federal Court of Appeals judgment in a criminal case.

3. Respondent, presently incarcerated in the South Dakota State Penitentiary, is financially unable to obtain adequate representation or to meet necessary expenses of this Court.

4. Jerry Buckley Helm, Respondent in this case, desires John Joseph Burnett be appointed his counsel in this case.

5. John Joseph Burnett is presently director of the Pennington County Public Defender's Office. He was admitted to the Bar of the State of South Dakota and licensed to practice in South Dakota in May of 1976, has continually practiced law since that date and is presently in good standing in the Bar of South Dakota. John Joseph Burnett is also admitted to practice in the United States District Court, District of South Dakota and in the United States Court of Appeals for the Eighth Judicial Circuit. John Joseph Burnett is also admitted to practice and a member of the Bar of the United States Supreme Court.

6. John Joseph Burnett received his Bachelor of Arts Degree from Saint John's University, Collegeville, Minnesota, May 24, 1970. John Joseph Burnett received the degree of Juris Doctor from the University of South Dakota, School of Law on May 8, 1976.

7. While at the University of South Dakota, John Joseph Burnett was a member of the Moot Court Board and received extensive training in Appellate Advocacy. John Joseph Burnett was admitted to the Order of Barristers upon his graduation from Law School. Since then John Joseph Burnett has had extensive experience in criminal appeals.

8. John Joseph Burnett was a member of the Pennington County Public Defender's Office when the office was appointed Mr. Helm's attorney at the time of his sentence in the Seventh Judicial Circuit, State of South Dakota. The Pennington County Public Defender's Office was also Mr. Helm's attorney in his appeal to the South Dakota Supreme Court.

9. John Joseph Burnett was appointed Mr. Helm's attorney under the Criminal Justice Act of 1964, in Mr. Helm's Petition for Writ of Habeas Corpus in the United States District Court for the District of South Dakota, Western Division. John Joseph Burnett was also appointed Mr. Helm's attorney under the Criminal Justice Act of 1964 in the appeal of the District Court's Denial of the Writ of Habeas Corpus to the United States Court of Appeals for the Eighth Judicial Circuit. The present case before this Court involves appeal of the Eighth Circuit's reversal of the District Court's Denial of the Writ of Habeas Corpus.

10. John Joseph Burnett filed the Brief in Opposition to Petition for Certiorari in this case as well as the Motion for Leave to Proceed in Forma Pauperis for Mr. Helm in this case.

11. Under South Dakota Codified Laws §7-16A-11 (1978) a public defender in South Dakota is expressly authorized to represent a client in a Federal Court of the United States

if the matter arises out f or is related to an action pending or recently pending in a court of criminal jurisdiction of the State, which is the situation in this case. Any compensation paid by a Federal Court of the United States shall be placed directly in the public defender fund.

12. Considering John Joseph Burnett's qualifications, considering his prior involvement in as well as knowledge of this case, and considering Respondent, Mr. Helm's, desire to have John Joseph Burnett represent him in this case, it is respectfully submitted this Court should appoint John Joseph Burnett Respondent's counsel in this case under Supreme Court Rule 46.

Dated this 17 day of December, 1982.

John Joseph Burnett

John Joseph Burnett
Pennington County
Public Defende
Pennington County Courthouse
Rapid City, South Dakota 57701
Telephone: (605) 394-2181

82-492

NO. 82-

Office - Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

JERRY BUCKLEY HELM,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN J. BURNETT
Pennington County
Public Defender
Pennington County Courthouse
Rapid City, South Dakota
57701
Telephone (605) 394-2181

Counsel for Respondent

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	5
I. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS NOT DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.	5
II. THE QUESTION OF FEDERAL LAW PRESENTED BY THIS CASE DOES NOT INVOLVE AN ISSUE OF SUCH NATIONAL IMPORTANCE THAT IT REQUIRES THE VALUABLE TIME OF THE COURT.	9
III. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS NOT RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL ON THE SAME MATTER.	10
CONCLUSION	12
APPENDIX	14

TABLE OF AUTHORITIES

CASES	PAGE
Britton v. Rogers, 631 F.2d 572 (8th Cir. 1980)	11
Coker v. Georgia, 433 U.S. 584 (1977)	8
Furman v. Georgia, 408 U.S. 238, 306 (1972)	6
Gov't of Virgin Islands v. Gereau, 592 F.2d 192 (3rd Cir. 1979)	12
Hutto v. Davis, __U.S.__, 102 S.Ct. 703 (1982)	8, 9
Moore v. Corvan, 560 F.2d 1248 (1977)	12
Rummel v. Estelle, 445 U.S. 263 (1980)	5, 6, 7, 8, 9
State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980)	2, 3, 4
Terrebonne v. Blackburn, 646 F.2d 997 (5th Cir. 1981)	11
United States v. Valenzuela, 646 F.2d 352 (9th Cir. 1980)	11
STATUTES	
SDCL §22-7-8 (1978)	2
SDCL §§24-5-1	9
SDCL §24-15-4 (1978)	4
SDCL §§24-15-5	9

OTHER REFERENCES

28 U.S.C. § 2253 5

28 U.S.C. § 2254 5

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears in the appendix (Appendix A, pp. A-1 to A-21).

The opinion of the South Dakota Supreme Court appears in the appendix (Appendix A, pp. A-22 to A-40).

NO. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

JERRY BUCKLEY HELM,

Respondent.

STATEMENT OF THE CASE

Jerry Helm, Respondent in this case, was convicted after a plea of guilty of the offense of Uttering a No Account Check of $100. Under South Dakota law

at the time, the maximum penalty he could receive on a conviction for that offense would be 5 years imprisonment and/or a $5,000 fine. However, Respondent also entered, against his attorney's advice, a plea of guilty to a second part of the information, alleging appellant had been previously convicted of six prior felonies. The six prior felonies consisted of: Three Third Degree Burglaries; one Obtaining Money Under False Pretenses; one Grand Larceny; and one Third Offense Driving While Intoxicated. State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980). Under South Dakota law, when a person has been convicted of at least three prior felonies, in addition to the principal felony, the sentence for the principal felony is enhanced to the sentence for a Class 1 Felony. S.D.C.L. §22-7-8 (1978).

After Mr. Helm entered his plea to the No Account Check charge, the Trial Judge asked Mr. Helm to explain what happened. Mr. Helm stated:

> I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what, if I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places. Helm, supra at 501.

After entering his plea to both parts of the information, Mr. Helm waived a pre-sentence investigation and was immediately sentenced. The only facts in regard to the prior felony convictions which the Trial Judge knew at the time of pronouncing sentence were that they were all committed due to defendant's alcohol problem. Helm, supra at 498, 499, 501. Nonetheless, the Trial Court

sentenced Mr. Helm to be imprisoned for the rest of his life.

In understanding the severity of this sentence, it is important to bear in mind that S.D.C.L. §24-15-4 (1978) provides: "A person sentenced to life imprisonment is not eligible for parole by the Board of Pardons and Paroles." Therefore Mr. Helm's sentence in this case is life imprisonment without possibility of parole.

Respondent's appeal of his sentence to the South Dakota Supreme Court on the basis that his sentence was cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution as well as under the South Dakota Constitution resulted in affirmance of his conviction and sentence by three justices with two justices dissenting. Helm, supra. Subsequently, Respondent petitioned the United States District

Court for the District of South Dakota, Western Division, for a Writ of Habeas Corpus under 28 U.S.C. §2254. The District Court Judge denied Respondent's petition, citing Rummel v. Estelle, 445 U.S. 263 (1980), as controlling.

Respondent then appealed the District Court's decision to the United States Court of Appeals for the Eighth Circuit, pursuant to 28 U.S.C. §2253. The Eighth Circuit reversed and remanded Respondent's sentence "with directions to issue the writ if, within sixty (60) days following the issuance of our mandate, the State has not resentenced Helm."

The State then petitioned this Court for a Writ of Certiorari.

REASONS FOR DENYING THE PETITION

1. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS NOT DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The United States Court of Appeals for the Eighth Circuit correctly points out that Rummel v. Estelle, 445 U.S. 263 (1980) is not dispositive in this case. In Rummel, this Court, in refusing to apply to Rummel's sentence the proportionality analysis applied by the Court in death penalty cases, distinguished Rummel's sentence from a death sentence by quoting Justice Stewart in Furman v. Georgia:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice and it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity. Furman, 408 U.S. 238, 306 (1972); quoted in Rummel, supra at 472.

This distinction between the death sentence and Rummel's sentence of life imprisonment was applicable in Rummel's case since, as

pointed out by this Court in Rummel at page 279, Rummel would be eligible for parole under his Texas life sentence within 12 years. Consequently, his sentence was not totally irrevocable and did not reject his rehabilitation as a death sentence would.

The life sentence of Mr. Helm in this case, however, is totally without the possiblity of parole. Consequently, his sentence, unlike Rummel's approaches the irrevocability of a death sentence since his imprisonment for life cannot even be revoked by the possibility of parole. Also, Mr. Helm's sentence in this case rejects his rehabilitation completely. Therefore, as the United States Court of Appeals for the Eighth Circuit correctly pointed out:

> Because a life sentence without parole differs in kind from other sentences of imprisonment, the constitutional prohibition against

> cruel and unusual punishment requires that it bear some relationship to the severity of the underlying crime. (See Appendix, at A-14)

Recognizing that the procedures for imposing a life sentence without parole should approximate although need not correspond exactly to, those for imposing the death penalty (See Appendix at A-14), the United States Court of Appeal for the Eighth Circuit analyzed the proportionality of Mr. Helm's sentence to his offense employing the objective factors mandated by this Court in Coker v. Georgia, 433 U.S. 584 (1977).

Since Mr. Helm's life sentence without parole in this case was different in kind from Rummel's life sentence with parole, the United States Court of Appeals for the Eighth Circuit's decision is not in conflict with Rummel. Nor is the decision in conflict with Hutto v. Davis,

__U.S.__, 102 S.Ct. 703 (1982) (per curiam) since Hutto did not receive a life sentence and was eligible for parole.

Indeed, even with the Eighth Circuit's decision requiring Mr. Helm be resentenced within 60 days, the sentence of Mr. Helm in this case could still be more severe than that of Rummel and Davis. Under the Eighth Circuit Court's Order, Mr. Helm could still be sentenced by South Dakota to 99 years imprisonment. Under South Dakota law, Mr. Helm would then not be eligible for parole until over 38 years from the date of his sentencing. See S.D.C.L. §§24-5-1 and 24-15-5. This contrasts starkly with Rummel's sentence which allows for parole within twelve years.

II. THE QUESTION OF FEDERAL LAW PRESENTED BY THIS CASE DOES NOT INVOLVE AN ISSUE OF SUCH NATIONAL IMPORTANCE THAT IT REQUIRES THE VALUABLE TIME OF THE COURT.

As pointed out by the United States Court of Appeals for the Eighth Circuit, Nevada is the only jurisdiction outside of South Dakota where a life sentence without parole could be imposed for an offense like that Mr. Helm was convicted of in this case (See Appendix, at A-15 to A-17). Consequently, any decision by this Court would have a very limited, specialized effect nation-wide. Considering the enormous number of urgent national issues requiring decision by this Court, the very limited national effect of a decision in this case does not justify the time the Court would have to devote to make the decision.

III. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS NOT RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL ON THE SAME MATTER.

Petitioner argues the instant case conflicts with Britton v. Rogers, 631 F.2d 572 (8th Cir. 1980). As pointed out by the Eighth Circuit, however, this case differs from Britton v. Rogers, supra, in that in Britton, the Governor of Arkansas had commuted 30 life sentences to terms of years between 1974 and 1979. The Governor of South Dakota, on the other hand, has not commuted a single life sentence since 1975 and has turned down 22 applications for commutation during that period (See Appendix, at A-12 to A-13).

Terrebonne v. Blackburn, 646 F.2d 997 (5th Cir. 1981) and United States v. Valenzuela, 646 F.2d 352 (9th Cir. 1980) differ from the instant case for the reasons set forth by the United States Court of Appeal for the Eighth Circuit in its decision in this case (See Appendix, at A-18 Ftnt. 14).

Government of the Virgin Islands v. Gereau, 592 F.2d 192 (3rd Cir. 1979) differs from this case in that Gereau was eligible for parole under his life sentences, whereas Mr. Helm is not. Gereau at 195. Also, the eight counts of First Degree Murder, the offenses for which Gereau received his life sentences, are clearly distinguishable from the non-violent felonies for which Mr. Helm was sentenced.

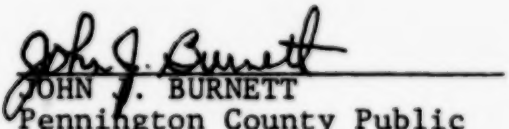
Moore v. Corvan, 560 F.2d 1248 (1977) also differs from this case in that the sentence of life imprisonment without parole was imposed upon Moore for conviction of three counts of rape. These offenses are clearly distinguishable from the non-violent felonies for which Helm was convicted.

CONCLUSION

Based on the foregoing arguments and authorities, Mr. Helm prays that the Petition

for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit be denied.

Respectfully submitted,



JOHN J. BURNETT
Pennington County Public Defender
Pennington County Courthouse
Rapid City, South Dakota 57701
Telephone: (605) 394-2181
Counsel for Respondent

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1039

Jerry Helm,	*	
	*	
Appellant,	*	
	*	
v.	*	Appeal from the United
	*	States District Court
Herman Solem, etc.,	*	for the District of
	*	South Dakota
Appellee.	*	

Submitted: April 23, 1982

Filed: August 4, 1982

Before LAY, Chief Judge; BRIGHT and ROSS, Circuit Judges.

BRIGHT, Circuit Judge.

Jerry Buckley Helm appeals from the denial of his petition for a writ of habeas corpus. He asserts that the sentence he received as an

habitual offender, life imprisonment without parole, constitutes cruel and unusual punishment. We agree, and, accordingly, reverse and remand for further proceedings consistent with this opinion.

I. Background.

Helm entered a guilty plea to a felony charge of uttering a "no account" check for $100. Against the advice of counsel, Helm also admitted to six prior felony convictions[1] and, as a result, was sentenced as an habitual offender.[2]

---

[1] The six prior felonies included three convictions for third degree burglary, and one conviction each for a third offense for driving while intoxicated, grand larceny, and obtaining money under false pretenses.

[2] At the time of Helm's conviction, South Dakota's habitual offender statute read:

> Three or more prior felony convictions--Sentencing as for Class 1 felony. When a defendant has been convicted of at least three prior convictions in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony. [S.D. Codified Laws Ann. § 22-7-8 (1979).]

The record indicates that Helm, age thirty-six at the time of his conviction, is an alcoholic and has spent much of the last fifteen years in the South Dakota State Penitentiary. State v. Helm, 287 N.W.2d 497, 499 (S.D. 1980). Alcohol contributed to Helm's actions leading to this conviction and each of his prior convictions. In describing the facts prior to his guilty plea to the bad check charge, Helm stated:

> "I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places." [State v. Helm, supra, 287 N.W.2d at 501.]

Following entry of his guilty plea, Helm waived his right to a presentence investigation and requested immediate sentencing. The state trial judge acceded to his request and made the following statement in pronouncing Helm's life sentence from the bench:

"Well, I guess most anybody looking at this record would have to acknowledge you have a serious problem, if you've been drinking all this time and your prior imprisonments have not had any effect on your drinking problem, so far as motivating you for change. If you get out in the near future, you're going to be committing further crimes, so I can't see any purpose in my extending any leniency to you at all here and I intend to give you a life sentence.

It will be up to you and the parole board to work out when you finally get out,[3] but I think you certainly earned

---

[3] It is unclear whether the sentencing judge believed that Helm would become eligible for parole under his life sentence, or whether the sentencing judge's reference to the parole board reflected his recognition that South Dakota statutes allow the Governor to delegate to the board of pardons and paroles certain functions regarding executive clemency. Those statutes provide:

> The Governor may, by executive order, delegate to the board of pardons and

> this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over." [State v. Helm, supra, 287 N.W.2d at 500.]

The statute in effect at the time of Helm's sentencing provided that "[a] person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S.D. Codified

---

> paroles the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to him. [S.D. Codified Laws Ann. § 24-14-1 (1979).]
>
> The Governor may submit an application for clemency to the board of pardons and paroles for its recommendation. The Governor may, by executive order, delegate to the board the authority to consider applications for clemency and make recommendations to him. The Governor is not bound to follow a recommendation returned by the board. [Id. § 24-14-5.]

Laws Ann. § 24-15-4 (1979). Thus, by imposing a life sentence, the sentencing judge committed Helm to the state penitentiary for the remainder of his natural life, barring a pardon or commutation of his sentence.

Helm appealed from his sentence, contending that the imposition of a sentence of life imprisonment without parole denied him due process and constituted cruel and unusual punishment. The Supreme Court of South Dakota, with two justices dissenting, affirmed the judgment of the trial court. State v. Helm, supra.

Helm then petitioned for a writ of habeas corpus in federal district court alleging that his sentence constituted cruel and unusual punishment, and that the sentencing procedure violated his right to due process because the judge imposed the maximum sentence allowed by law without a presentence investigation. The State filed an answer to Helm's petition, and the district court denied the petition without a hearing.

In a memorandum opinion, the district court determined that Helm had effectively waived any right to a presentence investigation, and that Rummel v. Estelle, 445 U.S. 263 (1980), disposed of Helm's claim that the sentence imposed constituted cruel and unusual punishment. Helm filed this appeal.

II. Discussion.

On appeal, Helm presses only his claim that a life sentence without parole under the circumstances of this case violates his constitutional right to be free from cruel and unusual punishment.[4] Helm contends that Rummel v. Estelle

---

[4] Helm exhausted his state remedies on both claims asserted in his federal habeas petition. The South Dakota Supreme Court considered and rejected his contentions that the state trial judge denied him due process by imposing a life sentence on the basis of inadequate information, and that such a sentence constituted cruel and unusual punishment. State v. Helm, supra, 287 N.W.2d at 498. Helm presented both claims in his habeas petition in federal district court. In its memorandum opinion, the district court stated that it was "satisfied that the Petitioner has exhausted his state remedies." Helm v. Solem,

does not control this case, because the life sentence imposed on Rummel carried with it the possibility of parole. We agree that Rummel is not dispositive.

In Rummel, the Supreme Court upheld the imposition of a mandatory life sentence under Texas' recidivist statute upon Rummel's felony conviction for obtaining $120.75 by false pretenses. At the time, Rummel had two prior felony convictions--passing a forged check in the amount of $28.36, and fraudulently using a credit card to obtain $80 worth of goods or services. 445 U.S. at 265-66. Rummel challenged his life sentence on the ground that it violated the proscription of the eighth and fourteenth amendment against cruel and unusual punishment because it

---

No. CIV 81-5148, slip op. at 1 (D.S.D. Dec. 12, 1981). Although Helm does not pursue his due process claim on appeal, he has complied with the total exhaustion rule recently announced by the Supreme Court in Rose v. Lundy, ___ U.S. ___, 102 S.Ct. 1198 (1982).

was so grossly disproportionate to the severity of his crime. The Court rejected the disproportionality analysis urged by Rummel, concluding that the task of drawing lines between one term of years and a shorter or longer term of years properly belonged to the legislature, not the courts. Id. at 275-76. The Court stated that

> one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative. [Id. at 274 (footnote omitted).]

The Court in Rummel, however, did not totally reject the idea that a term of imprisonment might be so disproportionate to the offense as to be unconstitutional. The plurality noted: "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, * * * if a legislature made overtime parking a felony punishable by life

imprisonment." Id. at 274 n.11. More importantly for the analysis in this case, the Court distinguished the life sentence at issue in Rummel from a life sentence without parole.

> Texas, we are told, has a relatively liberal policy of granting "good time" credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years. * * * We agree with Rummel that his inability to enforce any "right" to parole precludes us from treating his life sentence as if it were equivalent to a sentence of 12 years. Nevertheless, because parole is "an established variation on imprisonment of convicted criminals," Morrissey v. Brewer, 408 U.S. 471, 477 (1972), a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life. If nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person sentenced under a recidivist statute like Mississippi's, which provides for a sentence of life without parole upon conviction of three felonies including at least one violent felony. See Miss. Code Ann. § 99-19-83 (Supp. 1979). [Id. at 280-81.]

The State in this case contends, however, that no meaningful distinction exists between a

life sentence with parole and one without parole. It relies on Hutto v. Davis, ___ U.S. ___, 102 S.Ct. 703 (1982) (per curiam), to support its contention that a disproportionality analysis does not apply in noncapital cases. There, the Court upheld the imposition of two consecutive twenty-year sentences upon Davis' convictions for possession and distribution of less than nine ounces of marijuana. In rejecting Davis' cruel and unusual punishment claim, the Court stated that

> Rummel stands for the proposition that federal courts should be "reluctan[t] to review legislatively mandated terms of imprisonment," id. at 274, 100 S.Ct., at 1139, and that "successful challenges to the proportionality of particular sentences" should be "exceedingly rare," id. at 272, 100 S.Ct., at 1138. [102 S.Ct. at 705 (footnote omitted).]

We recognize that Rummel and Davis caution federal judges against imposing their subjective views of sentencing upon the states when reviewing claims that state sentences constitute cruel and unusual punishment because of their length.

Neither case, however, addressed the precise issue before us. Davis received consecutive sentences for a definite term of years. More significantly, the sentences imposed upon both Rummel and Davis carried the prospect of parole.[5] By contrast, Helm must serve the rest of his life behind bars.[6]

---

[5] The Supreme Court noted that under Texas' relatively liberal policy of granting good time credits, a prisoner with a life sentence could become eligible for parole in 12 years. Rummel v. Estelle, supra, 445 U.S. at 280.

In Davis's case, it appears that he would become eligible for parole upon serving one-third of his sentence. See W. Va. Code § 62-12-13 (Supp. 1981).

[6] The State contends that the possibility of commutation of Helm's sentence to a term of years with the possibility of parole brings the sentence in this case within the holding of Rummel. We recognize that the frequency with which a state's executive exercises its power of clemency might affect our disposition of this case. See Terrebonne v. Blackburn, 646 F.2d 997, 1000 (5th Cir. 1981) (en banc); Britton v. Rogers, 631 F.2d 572, 578 (8th Cir. 1980), cert. denied, 451 U.S. 939 (1981). In a similar case, the Fifth Circuit took judicial notice of statistics on the frequency of commutations. Terrebonne v. Blackburn, supra, 656 F.2d at 1000 & n.4. At

A life sentence without parole differs qualitatively from a sentence for a term of years or a life sentence with the prospect of parole. As with the death penalty, the State totally rejects

---

oral argument, therefore, we asked counsel for the State to supply us with statistics on commutations of life sentences in South Dakota.

We have reviewed the information supplied and conclude that the possibility of a commutation for Helm is entirely too speculative to equate his life sentence with that in Rummel. The statistics indicate that 22 prisoners in the South Dakota penitentiary had their life sentences commuted between 1964 and 1975. The statistics, however, do not indicate what percentage of requests during this same time period were denied. Moreover, since 1975, the Governor of South Dakota has commuted no life sentences but has denied requests for commutation of life sentences from 25 prisoners, including Helm. This case, therefore, differs from Britton v. Rogers, supra, 631 F.2d at 578, in which we noted that the Governor of Arkansas had commuted 30 life sentences to terms of years between 1974 and 1979.

On this record, we decline to equate the possibility of commutation with the possibility of parole in Rummel. Cf. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 464 (1981) (decision to commute long-term sentence does not depend upon objective factfinding, but upon purely subjective evaluations of those entrusted with that decision).

rehabilitation as a basic goal of our criminal justice system by imposing a life sentence without parole. Because a life sentence without parole differs in kind from other sentences of imprisonment, the constitutional prohibition against cruel and unusual punishment requires that it bear some relationship to the severity of the underlying crime. [7]

In comparing the length of sentence in this case to the offense, we remain mindful of the Supreme Court's admonition that a determination that a particular punishment is excessive should depend upon objective factors to the maximum extent possible. Coker v. Georgia, 433 U.S. 584, 592 (1977). Accordingly, we take into

---

[7] We recognize, of course, that a life sentence without parole also differs qualitatively from the death penalty. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). Therefore, in imposing such a sentence the procedures need not correspond exactly to those required for imposing the death penalty. See Terrebonne v. Blackburn, supra, 646 F.2d at 1008 (Frank Johnson, Jr., J., dissenting).

account the collective judgment of the fifty state legislatures and the nature of the offense[8] in evaluating the appropriateness of Helm's life sentence without parole. We recognize that some state will always bear the distinction of treating particular offenders more severely than any other state. See Rummel v. Estelle, supra, 445 U.S. at 282. When a disproportionality analysis is appropriate, however, the punishment that other states authorize for similar offenses provides an objective backdrop against which to judge the sentence under attack. See Coker v. Georgia, supra, 433 U.S. at 593-96.

Helm could have received a life sentence without parole for his offense in only one other state, Nevada.[9]

---

[8] In examining the nature of the offense, we look at the principal felony, uttering a no account check, in the context of a state's recidivist scheme. In so doing, we consider the nature of the prior felonies and the circumstances surrounding Helm's prior crimes.

[9] Nevada authorizes a sentence of life imprisonment with or without the possibility of parole for

Other states either do not authorize such a drastic sanction for habitual offenders,[10] or require at least one prior felony conviction for a violent crime as a prerequisite to a sentence of life imprisonment without parole.[11] Because Helm had

---

a person convicted of a felony or a crime in which intent to defraud is an element, if the person has three prior convictions. See Nev. Rev. Stat. § 207.010 (1981).

[10] See, e.g., Ariz. Rev. Stat. Ann. § 13-604 (Supp. 1981); Idaho Code §§ 19-2514, 20-223 (1979 & Supp. 1981); Ky. Rev. Stat. § 532.080 (Supp. 1980); Mass. Gen. Laws Ann. ch. 127, § 133B (1974); R.I. Gen. Laws § 12-19-21 (1981); S.C. Code Ann. § 17-25-40 (1977); Utah Code Ann. §§ 77-27-3, 7-11 (Utah Supp. 1981); Vt. Stat. Ann. tit. 13, § 11 (1974), tit. 28 § 501(a) (1981); Wash. Rev. Code Ann. §§ 9.92.090, 9.95.040(3) (1977).

[11] See Ala. Code § 13A-5-9(c) (3) (Supp. 1981) (violent felonies and treason); Ark. Stat. Ann. § 43-2328.1 (1977) (murder, rape, carnal abuse, or kidnapping); Del. Code Ann. tit. 11, § 4214 (1979) (specified violent felonies); Ill. Ann. Stat. tit. 38 § 33B-1, 1003-3-3(d) (Smith-Hurd Supp. 1981) (murder or class X felony); La. Rev. Stat. Ann. § 15:529.1(A) (2) (b) (1981) (burglary of pharmacy, aggravated battery, robbery, aggravated escape); Md. Code Ann. art. 27., § 643B (1982) (crimes of violence); Miss. Code Ann. § 99-19-83 (Supp. 1981) (one violent felony).

Alaska, Tennessee, and Wyoming appear to authorize life sentences without parole for certain

no prior convictions for violent crimes, see supra note 1,[12] he contends that life imprisonment without parole is grossly disproportionate to the severity of his offense. Based on our comparison of the laws of the other states, we agree. By refusing to impose a life sentence without parole upon habitual offenders or by reserving such a sentence for habitual offenders whose felonies

---

nonviolent crimes. For example, Alaska authorizes such a sentence for certain habitual drug offenders. Alaska Stat. § 17.10.200(c) (3) (1975). Tennessee provides for such a sentence for certain violent and infamous crimes as well as certain drug convictions. Tenn. Code Ann. §§ 40-2801, - 2806 (1975). And Wyoming authorizes a life sentence, apparently without parole, for a person convicted of four felonies. Wyo. Stat. §§ 6-1-110, 7-13-402 (1977). Helm's crime, however, would not have constituted a felony under Wyoming's bad check statute. See Wyo. Stat. § 6-3-124 (Supp. 1981).

[12] Helm had three third-degree burglary convictions. The record, however, fails to disclose that those crimes involved any violence. Moreover, third-degree burglary in South Dakota constitutes a crime against property, not persons, inasmuch as it entails entry of an unoccupied structure, S.D. Codified Laws Ann. § 22-32-8 (1979).

include at least one crime of violence,[13] the overwhelming majority of states indicate the inappropriateness of such a sentence in the circumstances of this case.[14]

---

[13] We recognize that the Supreme Court refused to distinguish between crimes of violence and property crimes in Rummel. 445 U.S. at 283 n. 27. The Court declined to make such a distinction, however, because it totally rejected the application of a disproportionality analysis in that case. Because the principle of proportionality applies in this case, we believe that the absence or presence of violence provides an appropriate criterion with which to compare Helm's sentence to sentences authorized by other states.

[14] We note that at least two courts have upheld life sentences without parole for drug convictions not involving actual violence. See Terrebonne v. Blackburn, 646 F.2d 997 (5th Cir. 1981) (en banc); United States v. Valenzuela, 646 F.2d 352 (9th Cir. 1981). In Terrebonne, however, the majority equated the distribution of heroin with crimes of violence. 646 F.2d at 1002. And in Valenzuela, the court upheld the sentence because "the district court exercised its discretion under 21 U.S.C. § 848 in imposing a life sentence, based upon its finding of a long-term, large-scale, highly profitable drug operation." 646 F.2d at 354 n.1 (citation omitted).

To the extent that the crimes in Terrebone and Valenzuela differ from the relatively minor property offenses at issue here, we believe those cases may be distinguished. To the extent that

An examination of the circumstances surrounding each of Helm's prior felony convictions indicates that a life sentence without parole is grossly disproportionate. In each of his crimes alcohol was a contributing factor. Although Helm's alcoholism does not excuse his failure to bring his conduct within the social norms prescribed by the criminal law, it is nonetheless a condition amenable to treatment. See Powell v. Texas, 392 U.S. 515, 562 (1968) (Fortas, J., dissenting). To forsake rehabilitation by imposing a life sentence without parole on an individual whose alcoholism has caused him to run afoul of the law, does not accord with "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). [15]

---

those cases rejected a disproportionality analysis in reviewing a life sentence without parole, however, we decline to follow them.

[15] We recognize that life sentences without parole do not invariably violate the proscription against

Accordingly, we conclude that a life sentence without parole in the circumstances of this case is so grossly disproportionate to the nature of the offense that its imposition constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments.[16]

---

cruel and unusual punishment. See Schick v. Reed, 419 U.S. 256, 267 (1974) (no parole condition attached to commutation of death sentence for murder); Gov't. of Virgin Islands v. Gereau, 592 F.2d 192, 195 (3d Cir. 1979) (conviction and sentence for eight counts of first-degree murder eliminated possibility of parole ; Moore v. Cowan, 560 F.2d 1298, 1303 (6th Cir. 1977), cert. denied, 435 U.S. 929 (1978) (life sentence without parole for rape conviction). In the circumstances of this case, however, considering the nature of Helm's offense and the punishments imposed for similar offenses in other states, the imposition of such a sentence violates the Constitution.

[16] The State points out that the life sentence imposed upon Helm is discretionary, and argues that a discretionary sentence is less harsh than a mandatory one. The discretionary nature of a sentence alone, however, cannot insulate a particular sentence from constitutional attack. The proscription against cruel and unusual punishment applies equally to sentences mandated by legislatures and those imposed by courts. See Furman v. Georgia, supra, 408 U.S. at 241 (Douglas, J., concurring).

We reverse and remand with directions to issue the writ if, within sixty days following the issuance of our mandate, the State has not resentenced Helm.[17]

A true copy.

Attest:

CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT.

---

[17] Although we recognize that Helm waived his right to a presentence investigation in the previous proceeding, we suggest that the state court conduct a presentence investigation before resentencing Helm.

STATE of South Dakota, Plaintiff
and Respondent,

v.

Jerry Buckley HELM, Defendant
and Appellant.

No. 12789.

Supreme Court of South Dakota.

Argued Nov. 7, 1979.

Decided Jan. 16, 1980.

Defendant plead guilty to the crime of uttering a no account check and also admitted to convictions for six previous felonies. The Circuit Court, Seventh Judicial Circuit, Pennington County, Thomas Parker, J., adjudged defendant to be an habitual offender and sentenced him to life imprisonment. On appeal, the Supreme Court, Dunn, J., held that imposition of a life sentence under habitual offender statute for crime of uttering a no account check, after convictions for six previous felonies, was not constitutionally offensive.

Affirmed.

Wollman, C. J., concurred specially and filed opinion.

Morgan, J., dissented and filed opinion.

Henderson, J. dissented and filed opinion.

CRIMINAL LAW 1211

Imposition of a life sentence under habitual offender statute for crime of uttering a no account check, after convictions for six previous felonies, was not constituionally offensive. (Per Dunn, J., with one Justice concurring and one Justice concurring specially.) SDCL 22-7-8; 22-7-1(2) (Repealed).

Margaret Crew, Asst., Atty. Gen., Pierre, for plaintiff and respondent; Mark V. Meierhenry, Atty. Gen., Pierre, on brief.

Joseph Neiles, Pennington County Asst. Public Defender, Rapid City, for defendant and appellant.

DUNN, Justice.

Defendant pled guilty to the crime of uttering a no account check. He also admitted to convictions for six previous felonies and was adjudged an habitual offender. He was sentenced to life imprisonment in the state penitentiary. Defendant appeals from this life sentence, contending that it was an abuse of discretion, that it denied him due process of law, and that it constituted cruel and unusual punishment. We affirm.

Before pleading to the primary charge, the trial court gave defendant a thorough explanation of his rights. He was informed on three occasions that his guilty plea would trigger the habitual offender statute and that he could be sentenced to life imprisonment. The defendant and the attorney representing him indicated that defendant understood his rights and the possible consequences of a guilty plea. After this explanation, defendant waived his right to a

preliminary hearing, insisted on pleading guilty, refused a presentence investigation and demanded immediate sentencing. The sentence of life imprisonment followed.

The constitutionality of South Dakota's habitual offender statute was upheld in State v. O'Connor, 265 N.W.2d 709 (S.D. 1978). This statute permits sentencing of a person convicted of three prior felony offenses within the guidelines of a Class 1 felony. SDCL 22-7-8 and SDCL 22-7-1(2). The maximum punishment for a Class 1 felony is a life sentence.

South Dakota has adopted the rule that a sentence within the statutory limits is not reviewable on appeal, even if it is regarded as excessive. State v. Williams, 84 S.D. 547, 173 N.W.2d 889 (1970); State v. Austin, 84 S.D. 405, 172 N.W.2d 284 (1969). This court has stated, however, that a sentence may be constitutionally offensive if its duration is so excessive as to "shock the conscience." State v. Bad Heart Bull, 257 N.W.2d 715 (S.D. 1977).

While the instant sentence is severe, it does not shock the conscience of the court. This was defendant's seventh felony conviction, and his record indicates that he had spent most of his adult lifetime behind bars. His consistent failure to reform places defendant squarely in the category of an habitual offender, and criminologists almost universally agree that the only remaining alternative is to remove such an offender from society and thus protect innocent victims from further criminal activities.

The defendant was fully informed of the possibility of a life sentence; yet he refused to accede to a presentence investigation that might have revealed mitigating factors with regard to his sentence. His main contention now is that his previous felonies involved nonviolent crimes and were due to a severe drinking problem. Our legislature did not see fit to apply the habitual offender statute solely to violent crimes, nor were

alcoholics excepted from its provisions. The legislature has provided this last resort sentence for habitual criminals who refuse to learn from their mistakes or to rehabilitate themselves. The record of this defendant fits all of these criteria, and the imposition of a life sentence, while severe, is not so unusual as to shock the conscience of the court. Such a sentence has not been found to be cruel or unusual in other jurisdictions. Cox v. Commonwealth, 514 S.W.2d 49 (Ky. 1974); State v. Custer, 240 Or. 350, 401 P.2d 402 (1965); State v. Gibson, 16 Wash. App. 119, 553 P.2d 131 (1976).

The judgment of the trial court is affirmed.

FOSHEIM, J. concurs.

WOLLMAN, C. J., concurs specially.

MORGAN and HENDERSON, JJ., dissent.

WOLLMAN, Chief Justice (concurring specially).

As Justice Henderson points out in his dissent, SDCL 24-15-4 precludes the Board of

Pardons and Paroles from granting defendant a parole. This statutory bar does not foreclose the Board from playing a role in defendant's ultimate term of imprisonment, however, for SDCL 24-14-1[1] and SDCL 24-14-5[2] permit the Governor to grant to the Board a significant voice in the exercise of executive clemency. The existence of this role for the Board gives substance to the trial court's statement referred to in Justice Henderson's dissent and militates against a conclusion that the trial court was laboring under a

---

[1] SDCL 24-14-1 provides: "The Governor may, by executive order, delegate to the board of pardons and paroles the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to him."

[2] SDCL 24-14-5 provides: "The Governor may submit an application for clemency to the board of pardons and paroles for its recommendation. The Governor may, by executive order, delegate to the board the authority to consider applications for clemency and make recommendations to him The Governor is not bound to follow a recommendation returned by the board."

misapprehension of law or fact that would constitute an error of constitutional magnitude similar to those giving rise to the holdings in United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); and Crowe v. State, 86 S.D. 264, 194 N.W.2d 234 (1972).

MORGAN, Justice (dissenting).

I join specially in the dissent of Henderson, Justice.

First, I would agree that some sentences could be constitutionally invalid. However, lest we open a new flood gate of appeals on sentencing, I would anticipate that review would not be necessary except upon imposition of life imprisonment or the death penalty.

With respect to this case, I too think the trial judge went too far. I agree with the trial judge's comments as far as they went. As I read the record, he had a 36-year-old man who had spent a good part of the previous 15 years in the state penitentiary. He apparently has an alcohol

problem; at least he and his counsel injected that into the record.* However, almost all the previous offenses for which he had been convicted involved money or property as did the one for which he was being sentenced. True, the law protects property and property interests, but I consider life imprisonment to be a sentence that should be reserved for offenses against persons. Certainly, such a sentence should be supported by a much more extensive record demonstrating a more compelling reason than mere recidivism and further demonstrating that the sentencing judge had imposed the maximum sentence only after contemplative deliberation considering all possible alternatives. The record before us demonstrates a rather summary decision from the bench.

I would remand for resentencing.

HENDERSON, Justice (dissenting).

---

* Defendant did not consent to a presentence investigation that might have substantiated that assertion.

The defendant was sentenced to life imprisonment in the South Dakota State Penitentiary after pleading guilty to a charge of uttering a no account check of $100.00 and entering an admission of guilt to being a habitual offender. SDCL 24-15-4 provides: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." Executive clemency is his only avenue of hope. As I attempt to arrive at a sense of fairness in the administration of justice in this case, this statute weighs heavily on my conscience.

At the time of sentencing, the court asked defendant if he had anything he wanted to say. He replied, "No," whereupon the court pronounced sentence.

> THE COURT: Well, I guess most anybody looking at this record would have to acknowledge you have a serious problem, if you've been drinking all of this time and your prior imprisonments have not had any effect on your drinking problem, so far as motivating you for change. If you get out in the near future, you're going to be committing

> further crimes, so I can't see any purpose in my extending any leniency to you at all here and I intend to give you a life sentence.
>
> It will be up to you and the parole board to work out when you finally get out, but I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over.

The sentence of the trial court cannot be anticipatory of the compassion of the State Board of Pardons and Paroles, for when a defendant is sentenced to lifetime imprisonment, it is beyond its jurisdiction to grant parole. Nor should this court contemplate a possible commutation of sentence through a grant of executive clemency. It is incumbent upon this court to determine the propriety of such a sentence at this juncture; another branch of government should not be burdened with rectifying this injustice.

I agree with the majority opinion that the sentence is severe. It is so severe and extreme that I find it constitutionally offensive. While this court has been traditionally reluctant to disturb a sentence on appeal, we nonetheless have long recognized the vagaries that inhere in the sentencing process. We stated in State v. Bad Heart Bull, 257 N.W.2d 715, 720 (S.D. 1977): "Although punishment by imprisonment is not per se cruel and unusual it may be constitutionally offensive when the duration of the sentence prescribed is so excessive or disproportionate to the crime as to shock 'the conscience and reason of men generally,'" citing State v. Becker, 3 S.D. 29, 40, 51 N.W. 1018, 1022 (1892). I do not choose to be shackled by the precedent of this court, namely, that a sentence within the statutory limits will not be disturbed on appeal. I find the language of the majority opinion especially alarming in light of the reenactment of the death penalty in this state. There

are instances, though rare, where departure from this precedent is mandated. Thus, the discretion of the trial court is not boundless, nor is the function of this court merely perfunctory with regard to the review of a criminal sentence.

The United States Supreme Court has firmly embraced the concept that the Eighth Amendment bars not only punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed. Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977); Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed2d 346 (1972); Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1957). Although the United States Supreme Court has yet to hold a sentence cruel and unusual on the basis of length alone, its reasoning has suggested that a disproportionately long sentence would not be immune from Eighth Amendment challenge. "[I]t is a precept

of justice that punishment for crime should be graduated and proportioned to [the] offense." Weems v. United States, 217 U.S. 349, 367, 30 S.Ct. 544, 549, 54 L.Ed. 793, 798 (1910).

The proscriptions embodied in the Eighth Amendment have broad application; the clause "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." Weems v. United States, 217 U.S at 378, 30 S.Ct. at 553, 54 L.Ed. at 803. As stated by Mr. Chief Justice Warren, in an oftquoted phrase, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. at 101, 78 S.Ct. at 598, 2 L.Ed.2d at 642. Thus, the application of the Eighth Amendment involves an assessment of contemporary values that reflect the public attitude toward a given sanction.

We must not lose sight of the basic concept of the Eighth Amendment, namely, that a penalty

must accord with "the dignity of man." Trop v. Dulles, supra. This has been interpreted to mean in one respect that the punishment not be "excessive." Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Under Gregg, a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the pointless infliction of suffering; or (2) is grossly disproportionate to the severity of the crime.

In Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 983, 94 S.Ct. 1577, 39 L.Ed.2d 881 (1974), the Fourth Circuit set forth four factors, central to the Supreme Court's major decisions applying the cruel and unusual punishment clause, in determining whether the length of the sentence imposed under the West Virginia recidivist statute was cruel and unusual because it was grossly disproportionate to the crimes involved. The Fourth Circuit considered

cumulatively: (1) the nature of the offense; (2) the legislative intent behind the punishment; (3) the punishment defendant would have received in other jurisdictions; and (4) the punishment meted out for other offenses within the same jurisdiction. The analysis in Hart was adopted by the Fifth Circuit in Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1978).

The factual situations in both Hart and Rummel bear a striking resemblance to the instant case. The Fifth Circuit concluded that Rummel's life sentence for the three crimes of obtaining money under false pretenses, intent to defraud, and passing a forged instrument was so grossly disproportionate to the offense as to constitute cruel and unusual punishment in violation of the Eighth Amendment. Likewise, in Hart, the court held that life imprisonment based on defendant's convictions of committing perjury, writing a check on insufficient funds and interstate transportation

of forged checks was constitutionally excessive and wholly disproportionate to the nature of the offenses committed, and not necessary to achieve any legitimate legislative purpose.

A life sentence in South Dakota, at the time sentence was imposed herein, could be imposed on any person convicted of a Class A felony (murder) and upon any person convicted of a Class 1 felony (manslaughter in the first degree, kidnapping, arson in the first degree). Although I do not condone the issuance of worthless checks, I think it is significant that this case involves one of the most passive felonies a person could commit. The trial court equated the gravity of this offense with the most serious felonies in our state. This is why I believe it is vastly disproportionate to the crime committed and shocking to the "conscience and reason of men generally."

Defendant was previously convicted of six felonies: three third-degree burglaries; obtaining money under false pretenses; grand larcency; and

a felony DWI. Defendant is an alcoholic; in each prior conviction, alcohol had contributed to his problems with law and society. In describing the facts leading to his conviction in this case, defendant stated: "I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places."

The defendant's history and the facts of this case mitigate against a prison cell for life. I do not presume to fully address the complex socxio-philosophical questions presented by this case; whether imprisonment is intended to serve a rehabilitative, retributive, or deterrent purpose, I leave to the legislature and sociologists. Neither is it my role to say what effect a defendant's recidivism should properly have upon the

sentencing process. I simply point out that all defendant's offenses were alcohol-related and involved money or property. He has been in and out of our state penitentiary several times. Notwithstanding, he has remained an alcoholic and compulsive check writer. Does justice require that after a certain point is reached, we just turn the key--lock the defendant up to languish in prison for a lifetime--and close the final chapter on his life? I cannot agree that justice dictates this result.

The sentence imposed is so excessive that it reaches constitutional dimension. I would reverse and remand the case for the limited purpose of resentencing this defendant proportionate to the offense. Defendant, if he rehabilitates himself, should at lease be given an opportunity to obtain parole during his lifetime.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JERRY BUCKLEY HELM, Appellant, v. HERMAN SOLEM, Warden, South Dakota State Penitentiary, Appellee.	CIV NO. 82-1039-SD MOTION FOR TECHNICAL CORRECTION

COMES NOW the Appellee, by and through his attorney Grant Gormley, Assistant Attorney General, pursuant to Rule 15 of the Rules of the United States Court of Appeals for the Eighth Circuit, and applies to this Court for a technical correction in its written opinion filed August 4, 1982, in the above-entitled matter.

At page 8, footnote 6 of its opinion, the Court states as follows:

> The statistics indicate that 22 prisoners in the South Dakota penitentiary had their life sentences commuted between

> 1964 and 1975. The statistics, however, do not indicate what percentage of requests during this same time period were denied. Moreover, since 1975, the Governor of South Dakota has commuted no life sentences but has denied requests for commutation of life sentences from 25 prisoners, including Helm.

In order to present a more accurate depiction of the data, Appellee respectfully requests that the above language be amended to read as follows:

> The statistics indicate that 22 prisoners in the South Dakota penitentiary had their life sentences commuted between 1964 and 1975. During the same time period, commutation requests from 12 prisoners were denied. Moreover, since 1975, the Governors of the State of South Dakota have commuted no life sentences but have denied requests for commutation of life sentences from 25 prisoners (the above 12 plus 13 more) including Helm. In sum, during the total time period for which statistics were made available, 22 life sentences were commuted while 25 life sentences were not.

WHEREFORE, Appellee prays that this Court technically correct its Footnote 6 in the above-entitled opinion.

Dated this 10th day of August, 1982.

Grant Gormley
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
Telephone (605) 773-3215

Attorney for Appellee

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JERRY BUCKLEY HELM, Appellant, v. HERMAN SOLEM, Warden, South Dakota State Penitentiary, Appellee.	CIV NO. 82-1039-SD MEMORANDUM IN SUPPORT OF MOTION FOR TECHNICAL CORRECTION

I

THE STATISTICS, HOWEVER, DO NOT INDICATE WHAT PERCENTAGE OF REQUESTS DURING THIS SAME PERIOD WERE DENIED.

It is the State's contention that the above sentence mistates the facts presented to this Court by the Affidavits of Ben Dearduff. The Dearduff affidavit of May 3, 1982, shows that the commutation requests of 12 prisoners (1. Brim, 2. Shaffer, 3. Nelson, 4. Percy, 5. White Hawk, 6.

Aschmeller, 7. Pickering, 8. Coryell, 9. Faller, 10. Procter, 11. Thibodeau, and 12. Hamm) were denied during the period from 1964 to 1975 inclusive.

II

MOREOVER, SINCE 1975, THE GOVERNOR OF SOUTH DAKOTA HAS COMMUTED NO LIFE SENTENCES BUT HAS DENIED REQUESTS FOR COMMUTATION OF LIFE SENTENCES FROM 25 PRISONERS, INCLUDING HELM.

The State would, first of all, point out that it has had three governors during the time in question, and, therefore, believes the sentence should read "Governors."

The State also believes that the language of this sentence should be expanded to indicate that the 25 prisoners mentioned include the 12 who had previously had their commutation requests denied. Otherwise, the misimpression is given that a wholly new 25 prisoners have requested and not received commutation of their life sentences. Or said another way, the number and

identities of the prisoners who have had their commutation requests denied since 1964 is the same as since 1975.

Finally, the State believes that a final sentence comparing the 22 sentences commuted with the 25 sentence not commuted (since 1964) is in order to fairly represent the facts presented to the Court. Otherwise, the Court by instituting an arbitrary 1975 dividing line in the 1964 to 1982 continuum has selected, without legal justification, a categorization ostensibly detrimental to the State's position.

WHEREFORE, Appellee prays that its Motion for Technical Correction, or any part thereof, be granted.

Dated this 10th day of August, 1982.

Grant Gormley
Assistant Attorney General

Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Motion for Technical Correction and Memorandum in Support of Motion for Technical Correction in the case of Jerry Buckley Helm v. Herman Solem, were served by United States mail, first class, postage prepaid, upon Mr. John J. Burnett, Attorney at Law, Pennington County Courthouse, Rapid City, South Dakota 57701, on this 10th day of August, 1982.

Grant Gormley
Assistant Attorney General

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 82-1039 September Term, 1981

Jerry Helm, Appellant,	)
	) Appeal from the United States
vs.	) District Court for District of South Dakota
Herman Solem, Warden South Dakota State Penitentiary, Sioux Falls, SD, Appellee.	)

On motion of appellant, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

August 26, 1982

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 82-1039 September Term, 1981

Jerry Helm, Appellant,	)
	) Appeal from the United States
vs.	) District Court for District of
Herman Solem, Warden etc., Appellee.	) South Dakota

It is now here ordered that appellee's motion for technical correction of footnote 6 be, and its is hereby, denied.

September 3, 1982

Office-Supreme Court, U.S.
FILED
DEC 23 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-492

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

JERRY BUCKLEY HELM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONER

MARK V. MEIERHENRY
ATTORNEY GENERAL

Grant Gormley
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
Telephone (605) 773-3215

Counsel for Petitioner

QUESTION PRESENTED

Whether a statutorily-authorized sentence of life imprisonment, without parole but with a right of commutation, for a nonviolent habitual offender's seventh felony constitutes cruel and unusual punishment under the Eighth and Fourteenth Admendments to the United States Constitution?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	v
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	8
ARGUMENTS AND AUTHORITIES	10
A STATUTORILY-AUTHORIZED SENTENCE OF LIFE IMPRISONMENT, WITHOUT PAROLE BUT WITH A RIGHT OF COMMUTATION, FOR A NONVIOLENT HABITUAL OFFENDER'S SEVENTH FELONY DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH ADMENDMENTS TO THE UNITED STATES CONSTITUTION.	
CONCLUSION	24
APPENDIX	

TABLE OF AUTHORITIES

CASES	PAGE
Coker v. Georgia, 433 U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977)	9, 10, 18
Gardner v. Florida, 430 U.S. 349, 51 L.Ed.2d 393, 401, 97 S.Ct. 1197 (1977)	14
Hutto v. Davis, 30 Cr.L. 4159, n. 2, 4161, 4162	PASSIM
Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 989, 98 S.Ct. 2954 (1978)	14
Rummel v. Estelle, 445 U.S. 263, 63 L.Ed.2d 382, 389, 390, 391, 395-396, 100 S.Ct. 1133 (1980)	PASSIM
State v. Helm, 287 N.W.2d 497, 498 (S.D. 1980)	4, 5
STATUTES	
SDCL 22-6-1(2)	3, 22
SDCL 22-7-8	3, 4, 23
SDCL 24-14-1	3
SDCL 24-14-5	3
SDCL 24-15-4	3, 5, 12
OTHER REFERENCES	
28 U.S.C. § 1254(1)	2

28 U.S.C. § 2241(d) 6

28 U.S.C. § 2253 6

Rule 20.2 of the Rules of the Supreme Court 2

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears in the appendix attached to the Petition for Writ of Certioriari at pp. A-1 to A-21.

The opinion of the United States District Court for the District of South Dakota appears in the supplemental appendix to the Petition for Writ of Certiorari.

The opinion of the South Dakota Supreme Court appears in the appendix attached to the Petition for Writ of Certiorari at pp. A-22 to A-40 and is also reported with the following citation: State v. Helm, 287 N.W.2d. 497 (1980).

NO. 82-492

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

JERRY BUCKLEY HELM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PETITIONER

JURISDICTIONAL STATEMENT

The Judgment of the Eighth Circuit Court of Appeals was entered on August 4, 1982. The

Petition for Writ of Certiorari was applied for on September 20, 1982, within the time set by Rule 20.2 of the Rules of the Supreme Court. The Petition for Writ of Certiorari was granted on November 8, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the Constitution of the United States provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusal punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person within its jurisdiction the equal protection of the laws.

The relevant portions of the South Dakota Codified Laws, SDCL 24-15-4, SDCL 22-7-8, SDCL 24-14-1, SDCL 22-6-1(2) and SDCL 24-14-5, are as follows:

> SDCL 24-15-4. A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles.
>
> SDCL 24-14-1. The Governor may, by executive order, delegate to the board of pardons and paroles the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to him.
>
> SDCL 24-14-5. The Governor may submit an application for clemency to the board of pardons and paroles for its recommendation. The Governor may, by executive order, delegate to the board the authority to consider applications for clemency and make recommendations to him. The Governor is not bound to follow a recommendation returned by the board.
>
> SDCL 22-6-1(2). Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished from each other by the respective maximum penalties hereinafter set forth which are authorized upon conviction;
>
> . . .

> (2) Class 1 felony: life imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;
>
> . . .
>
> SDCL 22-7-8. When a defendant has been convicted of at least three prior convictions in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony.

STATEMENT OF THE CASE

Jerry Buckley Helm pled guilty to a felony charge of uttering a no account check for one hundred ($100.00) dollars. Appendix to Petition for Certiorari [hereinafter "App. to Pet."], A-2 and A-24. Helm also admitted to being convicted of six (6) previous felonies for which "he had spent most of his adult lifetime behind bars." State v. Helm, 287 N.W.2d 497, 498 (S.D. 1980). Helm was adjudged to be an habitual offender under SDCL 22-7-8. App. to Pet., A-2 and A-24.

Following entry of his guilty plea, Helm waived his right to a presentence investigation

and requested immediate sentencing. App. to Pet., A-3 and A-24 to A-25. Helm was sentenced to life imprisonment in the state penitentiary. App. to Pet., A-25.

The statute in effect at the time of Helm's sentencing provided that "[a] person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." SDCL 24-15-4. App. to Pet., A-5. Thus, by imposing a life sentence, the sentencing judge committed Helm to the state penitentiary for the remainder of his natural life, barring a pardon or commutation of his sentence.

Helm appealed from his sentence, contending that the imposition of a sentence of life imprisonment without parole constituted cruel and unusual punishment. The Supreme Court of South Dakota affirmed the judgment of the trial court. State v. Helm, supra. App. to Pet., A-6.

Helm then petitioned for a writ of habeas corpus in federal district court alleging that his

sentence constituted cruel and unusual punishment. The United States District Court for the District of South Dakota, Western Division, exercising its jurisdiction pursuant to 28 U.S.C. § 2241(d), held that Helm had effectively waived any right to a presentence investigation, and that Rummel v. Estelle, 445 U.S. 263 (1980), disposed of Helm's claim that the sentence imposed constituted cruel and unusual punishment. App. to Pet., A-6 to A-7.

Helm then appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit, pursuant to 28 U.S.C. § 2253. App. to Pet., A-7. At oral argument before the Eighth Circuit panel, the State of South Dakota was requested to provide the Court with statistical evidence concerning the results of commutation requests from prisoners serving life sentences in the South Dakota state penitentiary. Those statistics were provided the Court (JA 20),

and indicated that twenty-two (22) prisoners in the South Dakota penitentiary had their life sentences commuted between 1964 and 1975. During the same time period, commutation requests from 12 prisoners were denied. Moreover, since 1975, the Governors of the State of South Dakota have commuted no life sentences but have denied requests for commutation of life sentences from twenty-five (25) prisoners (the above twelve (12) plus thirteen (13) more), including Helm. In sum, during the total time period for which statistics were made available, twenty-two (22) life sentences were commuted while twenty-five (25) life sentences were not. App. to Pet., A-41-A-47, and A-49.

Following oral argument, the Eighth Circuit panel reversed and remanded Helm's sentence "with directions to issue the writ if, within sixty (60) days following the issuance of our mandate, the State has not resentenced Helm." App. to Pet., A-21.

The State then petitioned this Court for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The United States Supreme Court has unambiguously established the constitutional standard to be applied to Eighth Amendment challenges like the present one, and the lower federal courts must be required to obey.

The established standard is that if: (1) the sentence is not death, (2) the sentence does not include any cruel "accompaniments," and (3) the charged criminal acts are "concededly classified and classifiable as felonies," any statutorily authorized period of incarceration is constitutionally permissible. In other words:

> Given the unique nature of the punishments considered in Weems and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence imposed is purely a matter of legislative prerogative.

Rummel v. Estelle, 445 U.S. 263, 63 L.Ed.2d 382, 391, 100 S.Ct. 1133 (1980). See also Hutto v. Davis, 30 Cr.L. 4159.

Insofar as Helm's sentence is not death, does not include "accompaniments," and is the product of criminal acts concededly classified and classifiable as felonies, Rummel is dispositive of Helm's constitutional claim.

Alternatively, Rummel disposes of Helm's claim because Helm's sentence is the product of his guilty plea to an habitual offender charge. As the dissenters noted in Hutto v. Davis, supra at p. 4162:

> Rummel rests on the understanding that, as a consequence of the overwhelming state interests in deterring habitual offenders, the Eighth Amendment does not preclude a state from imposing what might otherwise constitute a disproportionate prison sentence on an individual determined under state law to be a habitual offender. (Emphasis added.)

Finally, assuming, arguendo, that a proportionality analysis (Coker v. Georgia, 433 U.S.

584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977) is applicable to Helm's case, the State contends that a discretionary sentence of life imprisonment, without parole but with a right of commutation, for a convicted habitual offender with six (6) prior felony convictions is proportional.

ARGUMENTS AND AUTHORITIES

A STATUTORILY-AUTHORIZED SENTENCE OF LIFE IMPRISONMENT, WITHOUT PAROLE BUT WITH A RIGHT OF COMMUTATION, FOR A NONVIOLENT HABITUAL OFFENDER'S SEVENTH FELONY DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH ADMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Life is not death.

In Rummel v. Estelle, 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980), a Texas felon who had been previously convicted of "fraudulent use of a credit card to obtain $80 worth of goods for services" and "passing a forged check in the amount of $28.36" was convicted of obtaining $120.74 by false pretenses.

Upon conviction, Rummel, because of his two prior felony convictions and the prosecutor's decision to charge him as a recidivist, was given the life sentence mandated by Texas law.

Rummel subsequently challenged his life sentence as cruel and unusual punishment prohibited by the United States Constitution.

After argument, this Court ruled that Rummel's sentence was not prohibited cruel and unusual punishment within the meaning of the United States Constitution. In its analysis, the Court noted that it had on occasion found sentences "grossly disproportionate to the severity of the crime." Rummel, at p. 389. However, the Court further noted that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare," At p. 390. After an exhaustive review of the case law, the Court then concluded as follows:

> Given the unique nature of the punishments considered in Weems and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence imposed is purely a matter of legislative prerogative.

At p. 391.

However, the Eighth Circuit panel, in its Helm opinion (see App. to Pet., at A-12 to A-13), ruled that Rummel is inapplicable to Helm's case because under the Texas statute, Rummel was eligible for parole whereas Helm is not eligible for parole as a matter of South Dakota law. SDCL § 24-15-4. The Eighth Circuit opinion rests on the assumption that for Eighth Amendment purposes, there are three categories of sentences--life with parole, life without parole, and death. App. to Pet., at A-13.

This novel theory, created from whole cloth, is, of course, necessary to the Eighth Circuit's

claim that Rummel is not dispositive of Helm's appeal. However, this novel theory does not comport with this Court's analysis in Rummel. As stated by the Rummel Court:

> Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel. (Emphasis added.)

At p. 390.

Moreover, this Court in its per curiam opinion in Hutto v. Davis, 30 Cr.L. 4159, analyzed Rummel and concluded:

> In rejecting that argument, we distinguished between punishments--such as the death penalty--which by their very nature differ from all other forms of conventionally accepted punishment, and punishments which differ from others only in duration. (Emphasis added.)

It is, therefore, the State's position that the Eighth Circuit's opinion is not consistent with Rummel, as Rummel is understood by its authors,

the United States Supreme Court. Nor is it consistent with this Court's death penalty cases wherein it is stated that the rejection of some death statutes as cruel and unusual punishment "rested on the predicate that the penalty of death is qualitatively different from any other sentence." Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 989, 98 S.Ct. 2954 (1978). See also Gardner v. Florida, 430 U.S. 349, 51 L.Ed.2d 393, 401, 97 S.Ct. 1197 (1977).

Therefore, the State of South Dakota respectfully requests that this Court reject the Eighth Circuit's analysis as contrary to the analytical framework previously adopted by the United States Supreme Court. The State's request is especially meritorious in view of the fact that under the Eighth Circuit's analysis, death and life without parole are treated identically for Eighth Amendment purposes--that is, both are subject to proportionality analysis. Thus, the

Eighth Circuit has improperly equated life without parole and death.

B. Rummel's Footnote 11.

A second method by which the Eighth Circuit Court of Appeals attempts to justify its Eighth Amendment analysis is to note that the Rummel opinion admits that the "proportionality principle would come into play in an imprisonment sentence in extreme cases," citing p. 391, n. 11 which states the example of a legislature making "overtime parking a felony punishable by life imprisonment." The Eighth Circuit's point is also made by the dissenters in Hutto v. Davis, supra at p. 4161. However, as those same dissenters admit, "the per curiam suggests that because the punishment imposed on respondent was within the maximum prescribed by the state legislature, the Court of Appeals, which affirmed the District Court's grant of habeas relief on Eighth Amendment grounds, sanctioned an intrusion into the basic line-drawing province of legislatures, not

courts." The dissenters conclude that "by suggesting that it was improper for the courts below to engage in a disproportionality analysis, [the per curiam decision] represents a serious and improper expansion of Rummel." At p. 4161. The State is willing to accept the dissenters conclusion that the majority decision in Hutto v. Davis stands for the proposition that proportionality analysis is inapplicable to non-capitol punishment cases.

However, the State of South Dakota does not believe that the majority opinions in Rummel v. Estelle and Hutto v. Davis necessarily go so far. The language of Rummel setting forth the constitutional standard to be applied to Eighth Amendment challenges is consistent with the Rummel Court's overtime parking example. Again, the constitutional standard is:

> Given the unique nature of the punishment considered in Weems and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes

> concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence imposed is purely a matter of legislative prerogative. (Emphasis added).

Rummel, at p. 391. Clearly, the Rummel Court has created an exception to its nonintervention rule. If a crime is not concededly (1) "classified" and (2) "classifiable" as a felony, proportionality analysis may allow a sentence to be declared cruel and unusual.

With respect to overtime parking, the State of South Dakota is unaware of any state of the United States which has "classified" overtime parking as a felony. Furthermore, even if overtime parking were declared by some state to be a felony, the State of South Dakota believes that it would be generally agreed that overtime parking is not "concededly . . . classifiable" as a felony. Thus, overtime parking does not satisfy either the "classified" or "classifiable" requirements of Rummel.

In Helm's case, it is unchallenged that the writing of a no-account check is a felony in South Dakota ("classified"), and it is unchallenged that the writing of a no-account check rises to the level of a felony ("classifiable"). As a result, Helm's facts do not qualify under the Rummel exception.

In sum, the State of South Dakota respectfully requests that this Court reject others' attempts to use the Rummel overtime parking example to create cavernous exceptions to the Rummel rule.

C. The proportionality principle is not applicable to Helm's sentence.

Notwithstanding Rummel, the Eighth Circuit persists, however, by arguing that the proportionality test expressed by the Court in Coker v. Georgia, 433 U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977) is applicable to Helm's case.

In response, the State notes that Coker is a death penalty case and, therefore, irrelevant to Helm's sentence.

Moreover, the Eighth Circuit's Coker review of "the sentence imposed for commission of the same crime in other jurisdictions" is inapplicable because according to Rummel and Hutto v. Davis, supra at p. 4159, n. 2, this Court has rejected such comparisons, stating that "absent a constitutionally imposed uniformity, inimical to traditional notions of federalism, some states will always bear the distinction of treating particular offenders more severely than in any other state."

With respect to the Coker test of "the sentence imposed upon other criminals in the same jurisdiction," this Court has held "[t]his comparison was rejected in Rummel because other crimes implicate other societal interests, making any such comparison inherently speculative." Hutto v. Davis, supra at p. 4159, n. 2.

D. Helm's sentence is proportional.

With respect to the Coker test of "the nature of the offense," the State contends that Helm's seven felony convictions and incarceration for

most of his adult life necessitates the conclusion that the criminal behavior for which Helm was sentenced in the instant case constitutes "serious" criminal activity. Notwithstanding the Eighth Circuit's categorization of Helm's crimes as non-violent, the State notes that while Helm is not a murderer or a rapist, he is an unrepentant thief.

Moreover, it cannot go without special emphasis that Helm is an admitted habitual offender. And as stated in Hutto v. Davis, supra at p. 4162:

> Rummel rests on the understanding that, as a consequence of the overwhelming state interests in deterring habitual offenders, the Eighth Amendment does not preclude a state from imposing what might otherwise constitute a disproportionate prison sentence on an individual determined under state law to be a habitual offender. (Emphasis added.)

The State, therefore, concludes that Helm's sentence is proportional.

E. The effect of "without parole."

Notwithstanding the foregoing realities, the Eighth Circuit distinguishes Helm's sentence (life

without parole) from Rummel's (life with parole) and claims that the difference is constitutionally significant.

In response, the State contends that a life sentence is a life sentence whether or not a state statute authorizes parole. Parole is a collateral event which occurs long after the pronouncement of a life sentence. Furthermore, parole is a mere possibility and is no more guaranteed than a gubernatorial commutation. As a result, the possibility of parole is not constitutionally significant.

Morever, the Eighth Circuit's attempt to elevate parole to a position of prominence in the present analysis to suggest that Helm's sentence is more severe than Rummel's ignores the following facts:

1. South Dakota law also contains the following statutes:

> SDCL 24-14-1 provides: 'The Governor may, by executive order, delegate to the board of pardons and paroles the

> the authority to hear applications for pardon, commutation, reprieve, or remission of fines and forfeitures, and to make its recommendations to him.'
>
> SDCL 24-14-5 provides: 'The Governor may submit an application for clemency to the board of pardons and paroles for its recommendation. The Governor may, by executive order, delegate to the board the authority to consider applications for clemency and make recommendations to him. The Governor is not bound to follow a recommendation returned by the board.'

Therefore, the possibility of commutation of Petitoner's life sentence narrows any alleged discrepancies between the South Dakota law and the Texas statute interpreted in Rummel. The fact that nearly half of all life sentences given in the past twenty years have been commuted testifies to the availability of commutation in South Dakota.

2. Rummel's life sentence was mandatory whereas Helm's life sentence is discretionary. See SDCL § 22-6-1(2) reading as follows:

> Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished

> from each other by the respective maximum penalties hereinafter set forth which are authorized upon conviction;
>
> . . .
>
> (2) Class 1 felony: life imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;
>
> . . . (Emphasis added.)

3. The South Dakota habitual offender statute under which Helm was sentenced required three prior convictions whereas the Texas statute in Rummel only required two.

> When a defendant has been convicted of at least three prior convictions in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony.

SDCL § 22-7-8.

Finally, to the Eighth Circuit's further assertion that Rummel's eligibility for parole was the crucial factor upholding his sentence, the State responds that the fact of parole was merely an illustration of the complexities involved in

Rummel's proposed interjurisdictional analysis. Rummel, at p. 395. Another factor of equal importance to the Court was "the role of prosecutorial discretion in any recidivist scheme." Rummel, at p. 395. And after review of those factors, the Rummel Court, at pp. 395-396, held as follows:

> Even if we were to assume that the statute employed against Rummel was the most stringent found in the 50 states, that severity hardly would render Rummel's punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other states. As Mr. Justice Holmes noted in his dissenting opinion in Lochner v. New York, 198 U.S. 45, 49 L.Ed. 937, 25 S.Ct. 539 (1905), our Constitution 'is made for people of fundamentally different views . . . .'

CONCLUSION

Within the parameters set forth in Rummel v. Estelle and Hutto v. Davis, Helm's sentence of life imprisonment, without parole but with a right of commutation, is constitutionally permissible under the Eighth and Fourteenth Amendments to the United States Constitution.

Therefore, the State of South Dakota respectfully requests that this Court reverse the Judgment of the Eighth Circuit Court of Appeals and find that Helm's sentence does not violate the United States Constitution.

Respectfully submitted,

MARK V. MEIERHENRY
ATTORNEY GENERAL

Grant Gormley
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
Telephone: (605) 773-3215

No. 82-492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HERMAN SOLEM, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY,
Petitioner,

v.

JERRY BUCKLEY HELM,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT

JOHN J. BURNETT
Pennington County
Public Defender
Pennington County Courthouse
Rapid City, South Dakota 57701
Telephone (605) 394-2181
Court-appointed
Counsel for Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether a sentence of life imprisonment without parole for a non-violent, alcoholic habitual offender's seventh felony constitutes cruel and unusual punishment under the Eight and Fourteenth Amendments to the United States Constitution?

INDEX

	Page
QUESTION PRESENTED.	i
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT.	10
Life Imprisonment Without Parole Is So Disproportionate to the Underlying Offenses for Which Helm Was Convicted that It Constitutes Cruel and Unusual Punishment	10
A. Because a Life Sentence Without Parole Differs in Kind from Other Sentences of Imprisonment, the Constitutional Prohibition against Cruel and Unusual Punishment Requires that It Bear Some Relationship to the Severity of the Underlying Crime. . .	11
1. Because a Sentence of Life Without Parole Cannot Be as Clearly Distinguished from the Death Penalty as Was the Sentence of Life with Parole in Rummel, Rummel Does not Control in this Case	12
2. Rummel's Eligibility for Parole Cannot Be Equated with the Possibility of Commutation in this Case.	18

Page

3. Because a Life Sentence without Parole Differs Qualitatively from Other Sentences of Imprisonment, the Sentence Must Be Proportional to the Offense 21

B. Helm's Sentence Is Unconstitutionally Excessive . . 27

1. A Life Sentence without Parole Is Grossly Disproportionate to the Offenses for which Helm Was Convicted 27

a. Examination of Helm's Prior Felony Convictions Indicates that a Life Sentence without Parole is Grossly Disproportionate. . 29

b. In Only One Other Jurisdiction Could Helm Have Received a Sentence as Severe as that Imposed upon Him in South Dakota. 33

c. South Dakota Punishes No Other Criminal Except One Convicted of Murder, First Degree Manslaughter, Kidnapping or Arson as Harshly as It

Page

Punished Helm and It Punishes More Dangerous Criminals Much Less Severly. 35

d. All Three Objective Criteria Indicate Helm's Sentence Is Disproportionate to His Offense. 36

2. The Life Sentence Without Parole Imposed Upon Helm Makes a Negligible Contribution to Acceptable Goals of Punishment. 38

a. A Much Shorter Sentence than Life Imprisonment without Parole Is Sufficient to Deter an Offender Such as Helm. . 39

b. Recidivist Laws Isolate only Petty Offenders, Who Remain Incarcerated for a Much Longer Period than Societal Protection Requires 41

c. Retribution Is Permissible only if Punishment Is Proportioned to the Offenses 44

d. Life Imprisonment without Parole Will Not Rehabilitate 44

CONCLUSION. 46

TABLE OF AUTHORITIES

CASES	PAGE
Badders v. United States, 240 U.S. 391 (1916)	23
Bordenkircher v. Hayes, 434 U.S. 357 (1978)	24
Britton v. Rogers, 631 F.2d 572 (8th Cir. 1980), cert. denied, 451 U.S. 939 (1981)	20
Coker v. Georgia, 433 U.S. 584 (1977)	PASSIM
Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981)	18
Enmunds v. Florida, __U.S.__, 73 L.Ed.2d 1140 (1982)	PASSIM
Furman v. Georgia, 408 U.S. 238 (1972)	16,37,45
Greenholz v. Nebraska Penal Inmates, 442 U.S. 1 (1979)	19
Gregg v. Georgia, 428 U.S. 153 (1967)	23,28
Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973)	29
Helm v. Solem, No. 82-1039, Appendix to Petition for Certiorari, A-1 (8th Cir., Aug. 4, 1982)	PASSIM
Hutto v. Davis, __U.S.__, 30 Cr.L. 4159 (1982)	17,34
Hutto v. Finney, 437 U.S. 678 (1972)	23

PAGE

Ingraham v. Wright, 430 U.S. 651 (1977) 23,24

Morrissey v. Brewer, 408 U.S. 471 (1972) 14,19

Powell v. Texas, 392 U.S. 515 (1968) 31

Robinson v. California, 370 U.S. 660 (1962) 44

Rudolph v. Alabama, 375 U.S. 889 (1963) 39

Rummel v. Estelle, 445 U.S. 263 (1980) PASSIM

Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978) 13

Spencer v. Texas, 385 U.S. 554 (1967) 39

State v. Fain, 617 P.2d 720 (Wash. 1980) 29

State v. Helm, 287 N.W.2d 497 (S.D. 1980) PASSIM

State v. Mullaley, 618 P.2d 586 (Ariz. 1980) 29

Terrebonne v. Blackburn, 646 F.2d 997 (5th Cir. 1981) 17,29

Trop v. Dulles, 356 U.S. 86 (1958) 31

Wainstreet v. Bordenkircher, 276 S.E.2d 205 (W. Vir. 1981) 29,32

Weems v. United States, 217 U.S. 349 (1910) 22,23 25,26

PAGE

Wolff v. McDonnell, 418 U.S. 539 (1974) 19

Woodsond v. North Carolina, 428 U.S. 280 (1976) 16

CONSTITUTIONS AND STATUTES

U.S. Const. Amend. VIII PASSIM

N.H. Const., Bill of Rights §18 (1783) 40

S.D. Codified Laws Ann. §22-7-8 (1979) 2

S.D. Codified Laws Ann. §22-22-1 (1978) 36

S.D. Codified Laws Ann. §22-30-7 (1976) 36

PUBLICATIONS

Grossman, The Treatment of Habitual Offenders in Canada, 9 Crim. L.Q. 95 (1966-1967) 42,43

Jeffries and Stephans, Defenses, Presumptions, and Burdens of Proof in the Criminal Law, 88 Yale L.J. 1325 (1979) 24

Katkin, Habitual Offender Laws: A Reconsideration, 21 Buffalo L. Rev. 99 (1971) 42,43

Klein, Habitual Offender Legislation and the Bargaining Process, 15 Crim. L.Q. 417 (1972-1973) 42,43

PAGE

Lynch, Parole and the Habitual Criminal, 13 McGill L.J. 632 (1967) 42,43

N. Morris, The Habitual Criminal (1951) 42,43

Murrah, The Dangerous Offender Under the Model Sentencing Act, 452 F.R.D. 161 (1967) 42,43

Radin, The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause, 126 U.Pa.L.Rev. 989 (1978) 39

S. Rubin, The Law of Criminal Correction, (2d.ed. 1973) 42,43

Wheeler, Towards a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia, 25 Stan.L.Rev. 62 (1972) 40

Williams, The Courts and Persistent Offenders, 10 Crim.L. Rev. 730 (1963) 41,42,43

1 The Bill of Rights 377 (B. Schwartz, ed. 1971) 40

Monograph, The Treatment of the Recidivist in the United States, 23 Can.B. Rev. 638 (1945) 42,43

Comment, The Eighth Amendment, Beccaria and the Enlightenment: an Historical Justification for the Weems v. United States Excessive Punishment Doctrine, 24 Buffalo L.Rev. 783 (1975) 41

NO. 82-492

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

JERRY BUCKLEY HELM,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The background proceedings, as stated in the Eighth Circuit panel opinion, are as follows:

Helm entered a guilty plea to a felony charge of uttering a "no account" check for $100. Against the advice of counsel, Helm also admitted to six prior felony convictions[1] and, as a result, was sentenced as an habitual offender.[2]

The record indicates that Helm, age thirty-six at the time of his conviction, is an alcoholic and has spent much of the last fifteen years in the South Dakota State Penitentiary. State v. Helm, 287 N.W.2d 497, 499 (S.D. 1980). Alcohol contributed to Helm's actions leading to this

---

[1] The six prior felonies included three convictions for third degree burglary, and one conviction each for a third offense for driving while intoxicated, grand larceny, and obtaining money under false pretenses. Helm v. Solem, No. 82-1039, Appendix to Petition for Certiorari, A-1, A-2 n.1 (8th Cir. 1982); State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980).

[2] South Dakota's habitual offender statute reads:

> Three or more prior felony convictions--Sentencing as for Class 1 felony. When a defendant has been convicted of at least three prior convictions in addition to the principle felony, the sentence for the principal felony shall be enchanced to the sentence for a Class 1 felony. [S.D. Codified Laws Ann. §22-7-8 (1979)] (quoted in Brief for Petitioner at 4).

conviction and each of his prior convictions. In describing the facts prior to his guilty plea to the bad check charge, Helm stated:

"I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places." [State v. Helm, supra, 287 N.W.2d at 501]

Following entry of his guilty plea, Helm waived his right to a pre-sentence investigation and requested immediate sentencing. The State trial judge acceded to his request and made the following statement in pronouncing Helm's life sentence from the bench:

"Well, I guess most anybody looking at this record would have to acknowledge you have a serious problem, if you've been drinking all this time and your prior imprisonments have not had any effect on your drinking problem, so far as motivating you for change. If you get out in the near future, you're going to be committing further crimes, so I can't see any purpose in my extending any leniency to you at all here and I intend to give you a life sentence.

It will be up to you and the parole board to work out when you finally get out, but I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before courts. You'll have plenty of time to think this one over." [State v. Helm, supra, 287 N.W.2d at 500.]

The statute in effect at the time of Helm's sentencing provided that "[a] person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S.D. Codified Laws Ann. §24-15-4 (1979). Thus, by imposing a life sentence, the sentencing judge committed Helm to the state penitentiary for the remainder of his natural life, baring a pardon or commutation of his sentence.

Helm appealed from his sentence, contending that the imposition of a sentence of life imprisonment without parole denied him due process and constituted cruel and unusual punishment. The Supreme Court of South Dakota, with two justices dissenting, affirmed the

> judgment of the trial court. State v. Helm, supra.
>
> Helm then petitioned for a writ of habeas corpus in federal district court alleging that his sentence constituted cruel and unusual punishment, and that the sentencing procedure violated his right to due process because the judge imposed the maximum sentence allowed by law without a pre-sentence investigation. The State filed an answer to Helm's petition, and the district court denied the petition without a hearing. In a memorandum opinion, the district court determined that Helm had effectively waived any right to a presentence investigation, and that Rummel v. Estelle, 445 U.S. 263 (1980), disposed of Helm's claim that the sentence imposed constituted cruel and unusual punishment. Helm filed this appeal.

Helm v. Solem, No. 82-1039, Appendix to Petition for Certiorari [hereinafter "App. to Pet."], A-1, A-2 to A-7 (8th Cir., Aug. 4, 1982).

The Eighth Circuit panel reversed and remanded Helm's sentence "with directions to issue the writ if, within sixty (60) days following the issuance of our mandate, the State has not resentenced Helm." Helm v.

Solem, supra at App. to Pet., A-21.

The State then petitioned this Court for a writ of Certiorari.

SUMMARY OF ARGUMENT

A. The Constitutional Prohibition Against Cruel and Unusual Punishment Requires that Sentence of Life Imprisonment without Parole Bear Some Relationship to the Severity of the Underlying Crime.

Petitioner argues that the proportionality analysis applied by this Court to the sentence of death in Coker v. Georgia, 433 U.S. 584 (1977) is inapplicable to this case, since the sentence involved in this case is life imprisonment, not death. Petitioner cites Rummel v. Estelle, 445 U.S. 263 (1980), as authority for this argument.

The sentence involved in Rummel was life with parole. This Court refused to apply the Coker proportionality analysis to Rummel's sentence because it differed in kind from a sentence of death. A sentence of life imprisonment without parole, however,

does not differ so clearly from a death sentence since both punishments are irrevocable and completely reject rehabilitation of the convict. Therefore, just as the death penalty, a life sentence without parole differs in kind from other sentences of imprisonment. The Eighth Amendment to the United States Constitution, therefore, requires that a sentence of life without parole bear some relationship to the severity of the underlying offense.

B. The Sentence in this Case Is Excessive.

This Court in Coker v. Georgia, 433 U.S. 584 (1977), indicated that a punishment is unconstitutionally excessive if it "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain or suffering; or (2) is grossly out of proportion to the severity of the crime." Id. at 592.

1. Disproportionality

The three objective factors (nature of the offense, punishment for the offense in other jurisdictions, and punishment for other offenses in the same jurisdiction) employed by this Court in analyzing the proportionality of an offense to the sentence imposed, all demonstrate Helm's sentence in this case is out of proportion to his offense.

a. Nature of the Offenses.

All of Helm's prior felony convictions were non-violent. All of the prior felony convictions were a product of Helm's alcoholism. The final felony which triggered Helm's sentence was also a product of his alcoholism and was not a very culpable offense.

b. Punishment for the Same Offense in Other Jurisdictions.

The Eighth Circuit in this case, after reviewing the habitual offender laws of all

the other states, discovered Nevada was the only jurisdiction outside of South Dakota where Helm could have received a sentence of life without parole for the offenses he was convicted of.

c. Punishment for Other Offenses in South Dakota.

In South Dakota only a person convicted of murder, first degree manslaughter, rape, first degree arson or kidnapping could receive a sentence as severe as that of Helm. A person convicted of first degree rape or robbery could not be sentenced as severely as Helm.

2. No Measurable Contribution to Acceptable Penal Goals.

Helm's sentence in this case serves none of the recognized legitimate goals of punishment.

A sentence short of permanent incarceration is sufficient to deter a non-violent offender such as Helm from further violations of the law.

Second, isolation of a repeat offender is an acceptable objective only to the degree that the offender endangers public safety or welfare. Helm does not present such a threat to public safety or welfare that his permanent incarceration is appropriate.

Third, retribution is a legitimate penal objective only when the punishment fits the crime.

Finally, Helm's sentence rejects his rehabilitation completely. A sentence which sought some rehabilitation of Helm through treatment of his alcoholism could as effectively satisfy society's interest in preventing future violations of the law as the life sentence without parole actually imposed.

ARGUMENTS

LIFE IMPRISONMENT WITHOUT PAROLE IS SO DISPROPORTIONATE TO THE UNDERLYING OFFENSES FOR WHICH HELM WAS CONVICTED THAT IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

A. Because a Life Sentence Without Parole Differs in Kind from Other Sentences of Imprisonment, the Constitutional Prohibition against Cruel and Unusual Punishment Requires that It Bear Some Relationship to the Severity of the Underlying Crime.

Petitioner argues that the proportionality test expressed by this Court in Coker v. Georgia, 433 U.S. 584 (1977) is inapplicable to Helm's sentence. Brief for Petitioner [hereinafter "Brief for Pet."] at 18. Petitioner relies on the recent decision of this Court in Rummel v. Estelle, supra. Brief for Pet. at 10 to 18.

The Eighth Circuit was correct in regarding Rummel v. Estelle as not controlling in this case. Because a sentence of life imprisonment without parole differs in kind from other sentences of imprisonment, including life imprisonment with parole, the Eighth Amendment to the United State Constitution requires that it bear some relationship to the severity of the

underlying crime.

1. Because a Sentence of Life without Parole Cannot Be as Clearly Distinguished from the Death Penalty as Was the Sentence of Life with Parole in Rummel, Rummel Does not Control in this Case.

In Rummel v. Estelle, supra, this Court held a life sentence under Texas recidivist law for conviction of three property related felonies did not constitute cruel and unusual punishment under the Eighth Amendment. In disposing of Rummel's argument that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime, this Court acknowledged in Rummel that that proposition had been previously expressed by the Court, most frequently in death penalty cases. Rummel, 445 U.S. at 271 (Rehnquist, Burger, White, and Blackmun, J J., plurality opinion). However, the proportionality principle as

applied in death penalty cases was of limited applicability to the sentence before the Court in Rummel since the sentence of death differs in kind from a sentence of imprisonment. Rummel, 445 U.S. at 272. Consequently, a plurality of this Court refused to apply a proportionality analysis to Rummel's sentence, although the Court did admit that a proportionality principle would come into play in an imprisonment sentence in extreme cases. Rummel, 445 U.S. at 274 n.11 (Rehnquist, Burger, White and Blackmun, JJ., plurality opinion).

Like the en banc Fifth Circuit Court of Appeals,[3] this Court attached importance to the fact that Rummel, although sentenced to life imprisonment, would be eligible for parole in as little as 12 years:

---

[3] See Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978).

> ...Texas, we are told, has a relatively liberal policy of granting "good time" credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years. See Brief for Respondent 16-17. We agree with Rummel that his inability to enforce any "right" to parole precludes us from treating his life sentence as if it were equivalent to a sentence of 12 years. Nevertheless, because parole is "an established variation on imprisonment of convicted criminals" Morrissey v. Brewer, 408 U.S. 471, 477, (1972), a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life. If nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person sentenced under a recidivist statute like Mississippi's, which provides for a sentence of life without parole upon conviction of three felonies including at least one violent felony. See Miss. Code Ann. §99-19-83 (Supp. 1979).

Rummel, 445 U.S. at 280-81 (Rehnquist, Burger, White and Blackmun, J J., plurality opinion).

The two factors which this Court employed in not applying the proportionality analysis to Rummel's sentence, i.e. the unique nature of the death penalty and Rummel's eligibility for parole, are not present in the sentence involved in this case. For Helm, although sentenced to the same penalty of life imprisonment as Rummel, is never eligible under South Dakota law for parole. His sentence of life imprisonment means he will remain imprisoned for the rest of his life. Consequently, Mr. Helm's sentence in this case is not so distinguishable from a sentence of death as to render inapplicable the proportionality principle applied by this Court in death penalty cases.

In Rummel, this Court in pointing out the vast difference between Rummel's sentence and a death sentence, quoted

Justice Stewart in Furman v. Georgia:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity. Furman, 408 U.S. 238, 306 (1972).

Rummel, 445 U.S. at 472 (Rehnquist, Burger, White and Blackmun, JJ., plurality opinion); see also Woodsond v. North Carolina, 428 U.S. 280, 304 (1976). Helm's sentence in this case though, unlike Rummel's, approaches the irrevocability of a death sentence since his imprisonment for life cannot even be revoked by the possibility of parole. Also, Mr. Helm's sentence in this case rejects his rehabilitation completely. It is not, therefore, unique from the death penalty in this rejection of the basic purpose of criminal justice.

Consequently, as pointed out by the Eighth Circuit in this case, the life sentence without parole of Helm differs in kind from the life sentence with parole of Rummel.[4]

> A life sentence without parole differs qualitatively from a sentence for a term of years or a life sentence with the prospect of parole. As with the death penalty, the state totally rejects rehabilitation as a basic goal of our criminal justice system by imposing a life sentence without parole.[5]

---

[4] Petitioner also argues that this Court's per curiam decision in Hutto v. Davis, __U.S.___, 30 Cr. L. 4159 (1982), controls this case. Pet. Brief at 13. However, as pointed out by the Eighth Circuit in its opinion in this case (App. to Pet., A-12), Hutto v. Davis is inapposite to this case since Davis did not receive a sentence of life imprisonment but consecutive sentences for a definite term of years; morever, Davis' sentence carried the prospect of parole.

[5] The Eighth Circuit also recognized that a life sentence without parole also differs qualitatively from the death penalty. Therefore, in imposing such a sentence the procedures need not correspond exactly to those for imposing the death penalty. Helm v. Solem, App. to Pet., A-14 n.7. See also Terrebonne v. Blackburn, 646 F.2d 997, 1008 (5th Cir. 1981) (Frank Johnson, Jr., J., dissenting).

Helm v. Solem, App. to Pet., A-13 to A-14.

2. Rummel's Eligibility for Parole Cannot Be Equated with the Possibility of Commutation in this Case.

Petitioner argues that Helm's sentence is not constitutionally distinguishable from Rummel's by equating eligibility for parole with a "right of commutation." Brief for Pet. at 21.

First of all, Helm has no "right of commutation." This Court, in deciding against a Connecticut prisoner's claim to the right of written notice of the reason for denial of his application for commutation of his sentence, defined the prisoner's interest in commutation as "simply a unilateral hope," not a right. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465 (1981). Helm's "unilateral hope" for executive clemency is no more, and is entitled to no more weight in assessing the severity of his sentence,

than the hope for clemency of a prisoner sentenced to death.

In contrast, this Court in Morrissey v. Brewer, 408 U.S. 471, 477 (1972), stated:

> During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. Note, Parole Revocation in the Federal System, 56 Geo. L.J. 705 (1968). Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals.[6]

In Wolff v. McDonnell, 418 U.S. 539 (1974), this Court held the interests of Nebraska prisoners in earlier parole eligibility was a right protected by due process requiring minimum procedural

---

[6] The statistics cited by Justice Marshall in his dissenting opinion in Greenholtz v. Nebraska Penal Inmates, 442. U.S. 1, 30-31 (1979), attest to the integral part release on parole has in our penological system.

protections in disciplinary actions to revoke good time credits.

It is not true, as Petitioner asserts (Brief for Pet. at 21), that the Eighth Circuit in its decision in this case ignored the statistics showing the number of prisoners in South Dakota serving life sentences whose application for commutation of their sentence was granted or denied by the Govenor. In fact, the Eighth Circuit in Britton v. Rogers, 631 F.2d 572, 578 (8th Cir. 1980), cert. denied, 451 U.S. 939 (1981), noting that the Governor of Arkansas had commuted 30 life sentences to terms of years between 1974 and 1979, denied habeas corpus relief to an Arkansas prisoner who claimed his life sentence without parole was cruel and unusual punishment. In this case at oral argument, the Eighth Circuit panel requested the State of South Dakota to provide the Court

with statistical evidence concerning the results of commutation requests from prisoners serving life sentences in the South Dakota penitentiary. Brief for Pet. at 7. These statistics show that not a single life sentence has been commuted in South Dakota since 1975, although requests from 25 prisoners, including Helm, were denied during the same period. Joint Appendix [hereinafter "J.A."], 23 to 29. On such a record, the Eighth Circuit could simply not equate the possibility of commutation with eligibility for parole in Rummel. Helm v. Solem, App. to Pet., A-13 n.5.

3. Because a Life Sentence without Parole Differs Qualitatively from Other Sentences of Imprisonment, the Sentence Must Be Proportional to the Offense.

Because a life sentence without parole differs qualitatively from a sentence for a term of years or a life sentence with

prospects of parole, this Court's reasons for not applying a proportionality analysis to Rummel's sentence are not pertinent to the sentence in this case.

This Court has before applied the Eighth Amendment to invalidate an exceedingly long prison term. In Weems v. United States, 217 U.S. 349 (1910), the sentence involved was 12 years at cadena temporal, i.e. hard labor with chains, plus lifetime restrictions for falsifying a public record. Although the Weems Court based its decision that the sentence was unconstitutional in part on the inherent cruelty of the punishment, it also relied on the separate grounds that the Eighth Amendment prohibits excessively cruel punishment as well as inherently cruel forms of punishment and that the length of punishment must be proportioned to the

offense.[7] Although the Court has not held a sentence unconstitutionally disproportionate in length since Weems,[8] recent decisions appear to endorse the continuing validity of the Weems proportionality

---

[7] Gregg v. Georgia, 428 U.S. 153, 171-72 (1976) (Stewart, Powell and Stevens, JJ., plurality opinion); see Weems, 217 U.S. at 367-68, 371-73, 377; accord, Hutto v. Finney, 437 U.S. 678, 685 (1978); Furman v. Georgia, 408 U.S. 238, 325 (1972) (Marshall, J., concurring); compare Weems, 217 U.S. at 411 (dissenting opinion) (characterizing the majority as holding that "because of the mere term of imprisonment...[the sentence can be reviewed for an abuse of legislative discretion]"); see also Ingraham v. Wright, 430 U.S. 651, 667 (1977).

[8] In Badders v. United States, 240 U.S. 391, 394 (1916), this Court stated there was simply "no grounds for declaring the punishment unconstitutional." But Badders involved a sentence of 5 years for commission of 7 crimes, hardly comparable to a life sentence without parole. See Rummel, 445 U.S. at 290 n.7 (Powell, Brennan, Marshall and Stevens, JJ., dissenting). Morever, Badders, which does not mention Weems, is not even a disproportionality case; the convicted defendant's only Eighth Amendment objection challenged the mail fraud statutes making the deposit of each letter a separate offense. See 240 U.S. at 393.

principle as a restriction on excessively long sentences.[9]

In Rummel, this Court did not apply the proportionality principle espoused in Weems and in Coker v. Georgia, 433 U.S. 584 (1977), because the punishments in those two cases were clearly distinguishable from traditional forms of imprisonment, while the prison sentence of Rummel was not; consequently, this Court refrained from applying a proportionality analysis to Rummel's sentence because to do so would involve a more extensive intrusion

---

[9] Jeffries and Stephans, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1378 & n.164 (1979) (citing cases); see, e.g., Coker v. Georgia, 433 U.S. 584, 592 (White, Stewart, Blackmun and Stevens, JJ., plurality opinion), quoted approvingly in Ingraham v. Wright, 430 U.S. 651, 691 n.9 (1977) (White, Brennan, Marshall and Stevens, JJ, dissenting); Furman v. Georgia, 408 U.S. 238, 272 n.14 (1972) (Brennan, J., concurring); id. at 457 (Powell, Burger, Blackmun and Rehnquist, JJ., dissenting); Enmund v. Florida, __U.S.___, 73 L.Ed2d 1140, 1146 (1982); See also Bordenkircher v. Hayes, 434 U.S. 357, 370-71 (1978) (Powell, J., dissenting).

than was required in Weems and Coker into "...the basic line drawing process that is pre-eminently the province of the legislature when it makes an act criminal." Rummel, 445 U.S. at 275 (Rehnquist, Burger, White and Blackmun, JJ., plurality opinion).

However, a sentence of life imprisonment without parole, such as involved in this case, differs qualitatively from other sentences of imprisonment. See pp. 12-17 infra. A "bright line" between life without parole and "...various other permutations and commutations of punishment short of that...sanction" (Rummel, 445 U.S. at 275) can be drawn in this case just as such a "bright line" could be drawn between other forms of punishment and the punishments involved in Weems and in Coker. Consequently, the fear of more extensive intrusion

into the legislative prerogative, which compelled a plurality of this Court to hold back from applying a proportionality analysis in Rummel, is not present in this case.

The Eighth Circuit was following the doctrines articulated by this Court in Weems and Coker in holding that the Eighth Amendment required the sentence in this case (life without parole) bear some relationship to the severity of the underlying crime. Far from ignoring the dictates of this Court in Rummel cautioning against intruding on the line drawing process preeminently the province of the legislature, the Eighth Circuit carefully drafted its judgment to preclude South Dakota only from imposing the extraordinarily drastic punishment of life without parole, leaving South Dakota to draw its own lines among usual forms of imprisonment. See J.A., 30.

B. Helm's Sentence Is Unconstitutionally Excessive.

In Coker v. Georgia, 433 U.S. at 592, this Court stated that a punishment is unconstitutionally excessive:

> ...if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering or (2) is grossly out of proportion to the severity of the crime.

The tests are disjunctive: a punishment that fails under either test is invalid. Helm's sentence easily qualifies as excessive under the second test and is excessive under the first test also.

1. A Life Sentence without Parole is Grossly Disproportionate to the Offenses for which Helm was convicted.

In applying the second prong of the Coker test, the prong concerned with the proportion between the punishment and the offense, the Court should be informed by objective factors to the maximum extent

possible to avoid imposing subjective views. Rummel, 445 U.S. at 284 (Rehnquist, Burger, White and Blackmun, JJ., plurality opinion); Id., 445 U.S. at 292 (Powell, Brennan, Marshall and Stevens, JJ., dissenting); Coker, 433 U.S. at 592. Among the objective factors that should be considered according to the dissenting opinion in Rummel are:

> ...(i) the nature of the offense, see Coker v. Georgia, 433 U.S. at 598 (Powell, J., concurring in judgment in part and dissenting in part); (ii) the sentence imposed for commission of the same crime in other jurisdictions, see id, at 593-594; Gregg v. Georgia, 428 U.S. at 179-180; Weems v. United States, supra at 380; cf. Trop v. Dulles, 356 U.S. at 102-103, and (iii) the sentence imposed upon other criminals in the same jurisdiction.

Rummel v. Estelle, 445 U.S. at 295 (Powell, Brennan, Marshall and Stevens,

JJ., dissenting).[10]

a. Examination of Helm's Prior Felony Convictions Indicates that a Life Sentence without Parole is Grossly Disproportionate.

In applying the first objective factor, the nature of the offense, to the sentence imposed upon Helm in this case, it is first of all necessary to recall what Helm's prior convictions were. They consisted in three Third Degree Burglaries, one Obtaining Money Under False Pretenses, one Grand Larceny, and one Third Offense Driving While Intoxicated. Helm v. Solem, App. to Pet.,

---

10 See also: Terrebonne v. Blackburn, 646 F.2d 997, 1006 (5th Cir. 1971) (Frank Johnson, Jr., J., dissenting); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973); State v. Fain, 617 P.2d 720 (Wash. 1980); Wainstreet v. Bordenkircher, 276 S.E.2d 205 (W. Vir. 1981); State v. McDaniel, 612 P.2d 1231 (Kans. 1980); State v. Mullaley, 618 P.2d 586 (Ariz. 1980).

A-2n.1; State v. Helm, 287 N.W.2d 497 (S.D. 1980). None of the prior felonies of Mr. Helm involved injury to the person of another, threat of violence or the use of a weapon. This Court in Rummel suggested making the distinction between non-violent offenses and offenses involving violence inevitably involves identifying subjective distinctions beyond the province of the judiciary. Rummel, 445 U.S. at 275-76. However, as pointed out in the dissenting opinion in Rummel, it is no more difficult for the judiciary to perceive this distinction than the distinction between the gravity of murder and rape, as this Court did in Coker. Rummel, 445 U.S. at 295 n.12 (Powell, Brennan, Marshall and Stevens, JJ., dissenting).

In each of Helm's prior felonies, alcohol was a contributing factor. Helm

v. Solem, App. to Pet., A-19. As pointed out by the Eighth Circuit in this case:

> Although Helm's alcoholism does not excuse his failure to bring his conduct within the social norms prescribed by the criminal law, it is nonetheless a condition amenable to treatment. See Powell v. Texas, 392 U.S. 515, 562 (1968) (Fortas, J., dissenting). To forsake rehabilitation by imposing a life sentence without parole on an individual whose alcoholism has caused him to run afoul of the law, does not accord with "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).

Helm v. Solem, App. to Pet., A-19.

Of course, sole emphasis should not be placed on the final felony which triggered the sentence of Helm in this case, since the habitual offender statute was designed to enhance the penalty for persons with repeated felony convictions. However, for purposes of proportionality,

the last felony is entitled to more scrutiny than the preceeding felony convictions, "since it provides the ultimate nexus to the sentence." Wainstreet v. Bordenkircher, 276 S.E.2d 205, 212 (W. Vir. 1981).

Helm's principal felony in this case was a $100 no account check offense. In describing the offense to the trial court after his plea of guilty, Helm informed the Judge that he didn't even realize he had done it; he had started drinking and found himself with more money than he had started with; he knew he must have done something, but didn't know exactly what; if he had known about the check, he would have picked it up. Helm v. Solem, App. to Pet., A-3. The offense, then, which triggered Helm's sentence in this case was not a very culpable one; as Justice Henderson

stated in a dissenting opinion in State v. Helm, 287 N.W.2d at 501, Helm's offense "involves one of the most passive felonies a person could commit."

b. In Only One Other Jurisdiction Could Helm Have Received a Sentence as Severe as that Imposed upon Him in South Dakota.

An interjurisdictional comparison of Helm's sentence in this case with the sentence he could have received under the recidivist laws of the other states is considerably less complex and more obvious than the interjurisdictional comparison in Rummel. After an exhausting survey of the recidivist laws of all the states, the Eighth Circuit in this case discovered that Nevada was the only jurisdiction outside of South Dakota where Helm could have been sentenced to life without parole for the offense he was convicted of. Helm v. Solem, App. to Pet., A-16, A-15 to A-17

n. 9 to 11. Consequently, an overwhelming number of state legislatures, in addition to the Congress of the United States (See 18 U.S.C. §3575) have not adopted laws allowing for a sentence so severe as that received by Helm in South Dakota for the offense he committed. These legislative decisions lend credence to the view that Helm's sentence in this case is unconstitutionally disproportionate.[11] Coker v. Georgia, 433 U.S.

---

[11] Petitioner seeks to answer the glaring evidence of disproportionality attested to by the interjurisdictional comparison in this case by quoting from Hutto v. Davis; "Absent a constitutionally imposed uniformity; inimical to traditional motions of federalism, some states will always bear the distinction of treating particular offenders more severely than others." Hutto v. Davis, __U.S.__, 30 Cr.L. 4159, n.2 (1982) (quoted in Brief for Pet. at 19). However, the fact that Helm's sentence is more severe than possible in any other state except one is only one of three objective criteria employed to analyze whether his sentence is disproportionate. It is not, by itself, enough to regard the sentence as disproportionate to the offense. "The relevant objective factors should be considered together and, although the weight assigned to each may vary, no single factor will be controlling." Rummel,

at 593-596; Enmund v. Florida, __U.S.__, 73 L.Ed2d 1140, 1146-1149 (1982); Rummel v. Estelle, 445 U.S. at 300 (Powell, Brennan, Marshall and Stevens, JJ., dissenting).

c. South Dakota Punishes No Other Criminal Except One Convicted of Murder, First Degree Manslaughter, Kidnapping or Arson as Harshly as It Punished Helm, and It Punishes More Dangerous Criminals Much Less Severely.

A life sentence in South Dakota can be imposed on any person convicted of a class A or B felony (murder) and upon any person convicted of a class 1 felony (manslaughter in the first degree, kidnapping and arson in the first degree). State v. Helm, 287 N.W.2d at 501. All the other crimes for which a person in

---

supra, 445 U.S. at 299 n.19 (Powell, Brennan, Marshall and Stevens, JJ., dissenting).

South Dakota can be sentenced to life imprisonment, therefore, involve either death or the threat of death or violence. Helm, on the other hand, has never in his life committed any offense involving violence or the threat of violence to another. Still, in South Dakota, his sentence is more severe than the sentence imposed for such egregious violations of the rights of others involved in such crimes as first degree rape or first degree robbery. S.D. Codified Laws Ann. §§22-22-1 (1978); 22-30-7 (1976).

Comparison, then, of Helm's sentence with the sentence provided for other criminals in South Dakota also indicates Helm's sentence is not proportionate to his offense.

d. All Three Objective Criteria Indicate Helm's Sentence Is Disproportionate to His Offense.

All three objective criteria indicate, when considered separately, that Helm's sentence is disproportionate to his offense. When all three criteria are considered together, they compell the conclusion that Helm's sentence is grossly disproportionate to his offense.[12]

Justice Henderson, in dissenting from the South Dakota Supreme Court's affirmance of Helm's conviction and sentence, had this to say:

> ...I simply point out that all defendant's offenses were alcohol related and involved money or property. He has been in and out of our State Penitentiary several times. Not withstanding,

---

[12] Petitioner points out that the life sentence imposed upon Helm is discretionary, and argues that a discretionary sentence is less harsh than a mandatory one. Brief for Pet. at 22. The discretionary nature of a sentence alone, however, cannot insulate a particular sentence from consitutional attack. The proscription against cruel and unusual punishment applies equally to sentences mandated by legislature and those imposed by Courts. See Furman v. Georgia, 408 U.S. 238, 241 (1972) (Douglas, J.; concurring).

> he has remained an alcoholic and compulsive check writer. Does justice require that after a certain point is reached, we just turn the key--lock the defendant up to languish in prison for a lifetime--and close the final chapter on his life? I cannot agree that justice dictates this result.
>
> The sentence imposed is so excessive that it reaches constitutional dimension. I would reverse and remand the case for the limited purpose of resentencing this defendant proportionate to the offense. Defendant, if he rehabilitates himself, should at least be given an opportunity to obtain parole during his lifetime.

State v. Helm, 287 N.W.2d at 502.

2. The Life Sentence Without Parole Imposed upon Helm Makes a Negligible Contribution to Acceptable Goals of Punishment.

Coker makes clear that a punishment may be excessive if it fails to make a measurable contribution to any legitimate penal goal. Every conceivable legislative

purpose behind Helm's sentence - whether rehabilitation,[13] or isolation; deterrence or retribution[14]- is undermined by Helm's sentence or is served so irrationally by the laws application to him that the objective becomes unacceptable.[15]

a. A Much Shorter Sentence than Life Imprisonment without Parole Is Sufficient to Deter an Offender such as Helm.

---

13 Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, Douglas, Brennan, JJ., dissenting from a denial of Certiorari); Spencer v. Texas, 385 U.S. 554 (1967) (Warren, C.J., concurring and dissenting).

14 See Gregg v. Georgia, 428 U.S. 153, 183 (1976): "[t]he death penalty is said to serve two principle social purposes: retribution and deterrence of capital crimes by prospective offenders." quoted in Enmund v. Florida, __U.S.__, L.Ed.2d 1140, 1152 (1982).

15 Cf. Enmund v. Florida, __U.S.__, 73 L.Ed 2d 1140, 1153-54 (1976); see generally Radin, The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause, 126 U. Pa. L. Rev. 989, 1053, 1055 (1978) (The Coker "measurable contribution" test appears to require that punishment yield some social gain, perhaps even a net gain compared to the harm caused by the pain inflicted on the offender).

Even assuming a potential offender understands the nuances in each State's habitual offender statute,[16] a punishment deters effectively only if it is proportioned to the gravity of the crime. Otherwise, the punishment "is nothing more than the purposeless and needless imposition of pain and suffering" and hence unconstitutional. Enmund, 73 L. Ed.2d at 1152; Coker, 433 U.S. at 592.

When theft and compulsive check writing are punished less severely than armed robbery or rape, and as severely as murder, a criminal has no incentive to commit the less serious offense, and real distinctions between offenses blur.[17]

---

16 Considering Helm's statement to the sentencing Judge in this case (see App. to Pet., A-3), it appears very unlikely he contemplated or understood at all the criminal penalties attached when he wrote out the $100 no account check.

17 See: N. H. Const., Bill of Rights §18 (1783), in 1 The Bill of Rights 377 (B. Schwartz, ed. 1971); Wheeler, Towards a Theory of Limited Punishment II:

Fear of the extraordinary severity of a life sentence without parole would induce a previously convicted felon who commits a relatively trivial offense to perpetrate a more serious crime (e.g., inflicting serious injury while resisting arrest) to avoid apprehension out of fear of a sentence of life without parole.[18]

b. Recidivist Laws Isolate only Petty Offenders, Who Remain Incarcerated for a Much Longer Period than Societal Protection Requires.

Isolation of the habitual criminal for societal protection is an acceptable objective only to the extent that the punishment prescribed appears reasonably necessary to

---

The Eighth Amendment After Furman v. Georgia, 25 Stan. L. Rev. 62, 75 (1972); Williams, The Courts and Persistent Offenders, 10 Crim. L. Rev. 730, 737-38 (1963).

[18] See Comment, The Eighth Amendment, Beccaria and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine, 24 Buffalo L. Rev. 783, 737-38 (1975).

preserve public safety. Most habitual offender laws, however, are ineffective to society's legitimate concern for protection. Studies consistently reveal that such statutes fail to isolate the true threat to society - the professional, dangerous criminal.[19]

---

[19] Grossman, The Treatment of Habitual Criminals in Canada, 9 Crim. L. Q. 95, 101-104 (1966-1967); Klein, Habitual Offender Laws: A Reconsideration, 21 Buffalo L. Rev. 99, 106-08 (1971); Klein, Habitual Offender Legislation and the Bargaining Process, 15 Crim. L. Q. 417, 421, 433-35 (1972-1973); Lynch, Parole and the Habitual Criminal, 13 McGill L.J. 632, 633-34, 638, 644 (1967); Murrah, The Dangerous Offender Under the Model Sentencing Act, 452F.R.D. 161, 165 (1967); Tappan, Book Review, 65 Harv. L. Rev. 1092, 1094 (1952) (reviewing N. Morris, The Habitual Criminal [1951]); Williams, The Courts and Persistent Offenders, 10 Crim. L. Rev. 730, 730-31, 737 (1963); Monograph, The Treatment of the Recidivist in the United States, 23 Can. B. Rev. 638, 663-64 (1945).

Statistics indicate that "most serious offenders never repeat their crimes." S. Rubin, The Law of Criminal Correction, 466 (2d ed. 1973); cf. Lynch, supra, 13 McGill L. J. at 643 (parolees convicted for unpremeditated crimes have the lowest rate of recidivism).

Instead, recidivist laws typically ensnare mostly the petty thief, who may be a nuisance but threatens no one.[20] The result is needless drain on state resources and loss of potentially productive citizens. Even though society has a legitimate interest in removing such misfits from the general population for a time, when the actual sentence greatly exceeds that normally imposed on others with similar convictions who have not been charged as habitual offenders,[21] one can assume that societal protection does not warrant permanent incarceration and that the sentence thus serves no legitimate purpose.

---

[20] See authorities cited in note 19, supra.

[21] cf. Rummel, 445 U.S. at 300-301 (Powell, Brennan, Marshall and Stevens, JJ., dissenting).

c. Retribution Is Permissible Only if Punishment Is Proportioned to the Offenses.

This Court recently observed that a defendant's punishment "... must be tailored to his personal responsibility and moral guilt." Enmund, 73 L.Ed2d at 1154. Helm's personal responsibility and moral guilt for his alcohol induced[22] compulsive - check writing offense, as well as for his previous non-violent offenses, certainly does not demand he be incarcerated for the rest of his life.

d. Life Imprisonment without Parole Will Not Rehabilitate.

No one can seriously dispute that a life sentence with no parole serves any

---

[22] In Robinson v. California, 370 U.S. 660, 667 (1962) (cited in Enmunds, 73 L.Ed2d at 1153), a statute making narcotics addiction a crime was struck down under the Eighth Amendment even though such addiction "is apparently an illness which may be contracted innocently or involuntarily."

rehabilitative function. The State of South Dakota certainly has an interest in insuring that repeat offenders do not commit further crimes. This purpose could be as effectively handled by a death penalty. A punishment of imprisonment which sought some rehabilitation of Helm could also have as effectively satisfied the State's interest in preventing future violations of the law by Helm.

Justice Brennan observed in Furman v. Georgia, 408 U.S. 238, 279 (1972) (concurring opinion): "If there is a significantly less severe punishment to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive." The sentencing judge in this case was informed that all Helm's prior convictions, as well as the instant

one, were a product of Helm's alcoholism. State v. Helm, 287 N.W.2d at 498, 499 & 501. Despite this knowledge, the sentencing judge did nothing to consider a sentence which would aid Helm in overcoming his alcohol addiction except to summarily observe that Helm had not been motivated to stop drinking by his prior imprisonment. Helm v. Solem, App. to Pet., A-5 to A-6; State v. Helm, 287 N.W.2d at 500.

Consequently, the first prong of the Coker test cannot be said to have been met by the sentence in this case without a more extensive exploration of the possibilities of Helm's rehabilitation than was done by the sentencing judge in this case.

CONCLUSION

Upon the basis of the foregoing arguments and authorities, it is respectfully submitted this Court should affirm the

Judgment of the Eighth Circuit Court of Appeals.

Respectfully submitted,

s/ John J. Burnett
John J. Burnett
Pennington County
Public Defender
Pennington County Courthouse
Rapid City, South Dakota
57701
Telephone: (605) 394-2181
Court-appointed Counsel for
Respondent

Office-Supreme Court, U.S.
FILED
MAR 11 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-492

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

JERRY BUCKLEY HELM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

MARK V. MEIERHENRY
ATTORNEY GENERAL

Grant Gormley
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
Telephone (605) 773-3215

Counsel for Petitioner

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

ARGUMENTS AND AUTHORITIES 1

A STATUTORILY-AUTHORIZED SENTENCE OF LIFE IMPRISONMENT, WITHOUT PAROLE BUT WITH A RIGHT OF COMMUTATION, FOR A NONVIOLENT HABITUAL OFFENDER'S SEVENTH FELONY DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Helm says eligibility for parole cannot be equated with a possibility of commutation of sentence. 2

B. Helm says none of his felonies involved violence. 4

C. Helm says his alcoholism caused him to run afoul of the law. 5

D. Helm says his last felony is entitled to more scrutiny than the preceding felony convictions. 7

E. Helm says that a shorter sentence than life imprisonment would adequately serve penal goals. 8

F. Finally, the State of South Dakota contends that this Court ought not abandon its traditional deference to the legislative judgment. 10

CONCLUSION 11

TABLE OF AUTHORITIES

CASES	PAGE
Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 432-433, 92 S.Ct. 2726 (1972)	10
Hart v. Coiner, 483 F.2d 136 (CA 4), cert. denied, 415 U.S. 938 (1974)	9
Hutto v. Davis, 30 Cr.L. 4159, at p. 4159 n. 2	5, 9
Morrissey v. Brewer, 408 U.S. 471, 477 (1972)	2
Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382, 392, 397, 403-404 (1980)	2, 3, 5, 7
Wainstreet v. Bordenkircher, 276 S.E.2d 205, 212 (W.Va. 1981)	7
Wolff v. McDonnell, 418 U.S. 539 (1974)	2
STATUTES	
SDCL § 22-5-5	6

NO. 82-492

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

JERRY BUCKLEY HELM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ARGUMENTS AND AUTHORITIES

A STATUTORILY-AUTHORIZED SENTENCE OF LIFE IMPRISONMENT, WITHOUT PAROLE BUT WITH A RIGHT OF COMMUTATION, FOR A NONVIOLENT HABITUAL OFFENDER'S SEVENTH FELONY DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In his Brief, Respondent Jerry Buckley Helm, hereinafter referred to as "Helm," makes a number of specific arguments in support of his claim that his sentence constitutes cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendments to the United States Constitution. The State of South Dakota will respond to those contentions in the order in which they appear in Helm's Brief.

A. Helm says eligibility for parole cannot be equated with a possibility of commutation of sentence.

At pp. 18-20 of his Brief, Helm argues that parole, as an integral part of the penological system, is a right protected by due process of law, citing Morrissey v. Brewer, 408 U.S. 471, 477 (1972) and Wolff v. McDonnell, 418 U.S. 539 (1974), and not simply a unilateral hope like commutation of sentence.

However, in Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382, 403-404

(1980), Justice Powell, with whom Justices Brennan, Marshall, and Stevens joined, dissented as follows:

> Last Term in Greenholtz v. Nebraska Penal Inmates, 422 U.S. 1, 60 L.Ed.2d 688, 99 S.Ct. 2100 (1979), we held that a criminal conviction extinguishes whatever liberty interest a prisoner has in securing freedom before the end of his lawful sentence. The Court stated unequivocally that a convicted person has "no constitutional or inherent right . . . to be conditionally released before the expiration of a valid sentence." Id., at 7. Of course, a State may create legitimate expectations that are entitled to procedural protection under the Due Process Clause of the Fourteenth Amendment, but Texas has not chosen to create a cognizable interest in parole. The Court of Appeals for the Fifth Circuit has held that a Texas prisoner has no constitutionally enforceable interest in being freed before the expiration of his sentence. See Johnson v. Wells, 566 F.2d 1016, 1018 (1978); Craft v. Texas Board of Pardons and Paroles, 550 F.2d 1054, 1056 (1977).
>
> A holding that the possibility of parole discounts a prisoner's sentence for the purposes of the Eighth Amendment would be cruelly ironic. The combined effect of our holdings under the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment would allow a State to defend an Eighth Amendment claim by contending that

> parole is probable even though the prisoner cannot enforce that expectation. Such an approach is inconsistent with the Eighth Amendment. The Court has never before failed to examine a prisoner's Eighth Amendment claim because of the speculation that he might be pardoned before the sentence was carried out.
>
> Recent events in Texas demonstrate that parole remains a matter of executive grace. In June 1979, the Governor of Texas refused to grant parole to 79% of the state prisoners whom the parole board recommended for release. The State's chief executive acted well within his rights in declining to follow the board, but his actions emphasize the speculative nature of the Court of Appeals' reasoning. As this case comes to us, petitioner has been deprived by operation of state law of his right to freedom from imprisonment for the rest of his life. We should judge the case accordingly. (Emphasis added.)

It is, therefore, the State of South Dakota's contention that parole in Texas is not constitutionally distinguishable from a commutation of sentence in South Dakota.

B. Helm says none of his felonies involved violence.

At p. 30 of his Brief, Helm says "[n]one of the prior felonies of Mr. Helm involved injury

to the person of another, threat of violence or the use of a weapon." Helm, therefore, concludes that his sentence is disproportionate.

However, in Rummel, this Court noted that "the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal." Hutto v. Davis, 30 Cr.L. 4159, at p. 4159 n. 2; Rummel v. Estelle, supra at p. 392. The State of South Dakota concludes that Helm's habitual offender status moots the violence issue.

C. Helm says his alcoholism caused him to run afoul of the law.

At p. 31 of his Brief, Helm argues that his alcoholism caused him to run afoul of the law (quoting, with approval, from the Eighth Circuit opinion) and concludes that his sentence is disproportionate.

The State of South Dakota rejects Helm's and the Eighth Circuit's analysis. Even if it were

true that Helm consumed alcohol near the time of each of his seven felonies, the State of South Dakota can find no showing in the record that alcohol "caused" Helm to steal. The Eighth Circuit's assertion that alcohol "caused" Helm to run afoul of the law is unsupported by logic or the evidence. In view of the facts that most alcoholics do not steal and many thieves do not drink, the State of South Dakota contends that Helm, like most other thieves, steals because he has less money than he wants and can obtain by legal means. The State of South Dakota, therefore, concludes that it is inconsistent with human experience to assume that Helm steals because he drinks.

The State further notes that the Eighth Circuit's analysis is contrary to SDCL § 22-5-5 reading as follows:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any

> particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive, or intent with which he committed the act.

D. Helm says his last felony is entitled to more scrutiny than the preceding felony convictions.

At pp. 31-33 of his Brief, Helm argues, citing Wainstreet v. Bordenkircher, 276 S.E.2d 205, 212 (W.Va. 1981), that his last felony is entitled to more scrutiny than his preceding felony convictions because the last felony provides the ultimate nexus with the sentence. Helm concludes that his last felony was not very serious and, therefore, his sentence is disproportionate.

In response, the State of South Dakota would note the following language from Rummel v. Estelle, supra at p. 397:

> The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in

> the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.
>
> Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction. (Emphasis added.)

As to the seriousness of Helm's crime, it is noted that Helm's final conviction was for passing a check against a nonexistent account, not merely an insufficient funds check. It is, therefore, inconceivable that Helm "didn't realize he had done it" or that if Helm "had known about the check, he would have picked it up." Respondent's Brief at p. 32.

E. Helm says that a shorter sentence than life imprisonment would adequately serve penal goals.

Beginning at p. 39 of his Brief, Helm argues that a shorter sentence in his case would better serve penal goals and that, as a result, his sentence is disproportionate.

However, this Court, in Hutto v. Davis, supra at p. 4159 n. 2, analyzed the second factor in Hart v. Coiner, 483 F.2d 136 (CA 4), cert. denied, 415 U.S. 938 (1974), and concluded as follows:

> Hart's second factor calls for an examination of the purposes behind the criminal statute and the existence of less restrictive means of effectuating those purposes. On this factor the District Court was inconclusive, but noted that the amount of marijuana involved was less than nine ounces, implying that such minimal possession could adequately be deterred with shorter prison sentences. 432 F.Supp. at 452. Such analysis was implicitly rejected by our conclusion in Rummel that the "'small' amount of money taken" was inapposite, because to acknowledge that the state could have given Rummel a life sentence for stealing some amount of money, "is virtually to concede that the lines to be drawn are indeed 'subjective,' and therefore property within the province of legislatures, not courts." 445 U.S. 275-276.

F. Finally, the State of South Dakota contends that this Court ought not abandon its traditional deference to the legislative judgment.

In Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 432-433, 92 S.Ct. 2726 (1972), Chief Justice Burger, joined by Justices Blackmun, Powell, and Rehnquist, stated:

> The Court's quiescence in this area can be attributed to the fact that in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.
>
> . . .
>
> Accordingly, punishments such as branding and the cutting off of ears, which were commonplace at the time of the Constitution, passed from the penal scene without judicial intervention because they became basically offensive to the people and the legislature responded to this sentiment.

The State of South Dakota respectfully requests that this Court defer to the good judgment and compassionate hearts of the citizens of South Dakota as determined by their legislative representatives.

CONCLUSION

Based on the foregoing arguments and authorities, and on the arguments and authorities presented in its initial brief, the State of South Dakota respectfully requests that this Court reverse the decision of the Eighth Circuit Court of Appeals and find that Helm's sentence does not violate the United States Constitution.

Respectfully submitted,

MARK V. MEIERHENRY
ATTORNEY GENERAL

Grant Gormley
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
Telephone: (605) 773-3215

{SHOW } PROCEEDINGS AND ORDERS DATE: 033083

CASE NBR 82-1-00492 CFH

SHORT TITLE Solem, Warden DOCKETED: Sep 20 1982

VERSUS Helm, Jerry Buckley

Date	Proceedings and Orders
Sep 20 1982	Petition for writ of certiorari filed.
Oct 1 1982	Appendix of petitioner Solem, Warden filed.
Oct 18 1982	Motion of respondent for leave to proceed in forma pauperis filed.
Oct 18 1982	Brief of respondent Jerry Buckley Helm in opposition filed.
Oct 20 1982	DISTRIBUTED. November 5, 1982
Nov 8 1982	Petition GRANTED.
	**********
Nov 8 1982	Motion of respondent for leave to proceed in forma pauperis GRANTED.
Dec 20 1982	Motion of respondent for appointment of counsel filed.
Dec 23 1982	Brief of petitioner Solem, Warden filed.
Dec 23 1982	Joint appendix filed.
Dec 28 1982	DISTRIBUTED. Jan. 7, 1983. (Motion for appointment of counsel).

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 033083

CASE NBR 82-1-00492 CFH

SHORT TITLE Solem, Warden DOCKETED: Sep 20 1982

VERSUS Helm, Jerry Buckley

Date	Proceedings and Orders
Jan 10 1983	Motion for appointment of counsel GRANTED and it is ordered that John Joseph Burnett, Esquire, of Rapid City, South Dakota, is appointed to serve as counsel for the respondent in this case.
Jan 20 1983	Brief of respondent Jerry Buckley Helm filed.
Feb 14 1983	Record filed.
Feb 14 1983	Certified original record & C.A. proceedings, 2 volumes received.
Feb 15 1983	SET FOR ARGUMENT. Tuesday, March 29, 1983. (2nd case)
Feb 15 1983	CIRCULATED.
Mar 11 1983	Reply brief of petitioner Solem, Warden filed.
Mar 29 1983	ARGUED.